SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 441

GENERAL TRADING COMPANY, A CORPORATION DOING BUSINESS AS MINNEAPOLIS IRON STORE, PETITIONER,

vs.

STATE TAX COMMISSION OF THE STATE OF IOWA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

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—9349

[fol. 1] **IN THE SUPREME COURT OF IOWA**

No. —. At Law

STATE TAX COMMISSION OF THE STATE OF IOWA, Appellee,

vs.

GENERAL TRADING COMPANY, A CORPORATION, D/B/A MINNEAPOLIS IRON STORE, Appellant

APPEAL FROM POLK COUNTY DISTRICT COURT

HON. LOY LADD, JUDGE

Appellant's Abstract of Record—Filed February 8, 1943

[fol. 2] On May 21, 1942, plaintiff filed in the office of the Clerk of the District Court of Polk County, Iowa, the following verified

PETITION IN EQUITY

Comes now the plaintiff and for cause of action against the defendant states:

1. That the plaintiff is a branch of the government of the State of Iowa and is charged with the power and duty to collect the use tax due the State of Iowa under Chapter 329.4 of the 1939 Code of Iowa.

2. That the defendant General Trading Company is a corporation organized and existing under the laws of the State of Minnesota with its principal place of business in Saint Paul, Minnesota and said defendant is engaged in the sale of certain merchandise through its branch under the trade name of Minneapolis Iron Store located in Minneapolis, Minnesota.

3. That during the period from April 16, 1937 through September 30, 1941 the defendant sold merchandise to Iowa purchasers which merchandise was used and consumed by said purchasers in Iowa, and not purchased for resale or processing and the manner in which said sales of merchandise were made was as follows:

The defendant sent solicitors or sales representatives into the State of Iowa who made certain representations

concerning its merchandise and took orders from the Iowa purchasers subject to acceptance at defendant's place of business in Minnesota, and the property was subsequently delivered upon said orders in interstate commerce to the purchasers in Iowa.

4. Plaintiff states that by virtue of the manner in which [fol. 3] defendant sold its merchandise the defendant was, during the period heretofore set forth a "retailer maintaining a place of business within this State" within the definition in paragraph 6 of Section 6943.102 of the Use Tax Law of Iowa and as such, required to collect and pay to the State of Iowa the use tax in the amount of 2% of the purchase price of said merchandise so sold during said period, as provided in Section 6943.109 of the 1939 Code of Iowa.

5. Plaintiff states that defendant failed to file use tax returns for said period and failed to collect and pay to the State of Iowa the use tax due the State of Iowa for sales and deliveries of merchandise during said period under the provisions of Section 6943.113 of the 1939 Code of Iowa and thereafter on October 6, 1941 the plaintiff Commission, acting pursuant to the provisions of Section 6943.116 of the 1939 Code of Iowa, determined the amount due the State of Iowa for such sales and deliveries of merchandise during said period in the sum of $360.00 with penalty computed to October 6, 1941 in the sum of $102.96, or a total of $462.96 and there is attached hereto marked Exhibit 'A' and by reference made a part hereof a copy of said assessment. Notice of said assessment was given to the defendant by registered mail addressed to the defendant at its place of business in Minneapolis, Minnesota, a copy of which notice is attached hereto, marked Exhibit 'B' and by reference made a part hereof. The return receipt of the registered envelope containing the notice of assessment bears date October 7, 1941 and there is attached hereto marked Exhibit 'B-1' the return receipt of said registered envelope which is by reference made a part hereof.

6. Plaintiff states that no appeal was taken from said [fol. 4] determination of tax and the time for appeal has expired.

7. Plaintiff states that the tax obligation of the defendant is a debt owed by the defendant to the State of Iowa

and is in the sum of $360.00 with accrued penalty and interest.

Wherefore, plaintiff prays for judgment against the defendant in the sum of $360.00 for use tax due the plaintiff by the defendant together with all accrued penalty and interest as by law provided until date of payment.

EXHIBIT "A" TO PETITION

IOWA STATE TAX COMMISSION

Des Moines, Iowa

In the Matter of Tax Liability of MINNEAPOLIS IRON STORE, Minneapolis, Minnesota

Determination of Tax Due and Order to Assess

On this 6th day of October 1941, the matter of taxes due the State of Iowa, under Chapter 329.4, Code of Iowa, 1939, from the above named party, comes on for hearing and determination and the State Tax Commission finds as follows:

That the above party has, as of the 23rd day of May 1941, been duly notified to file Retailer's Use Tax Returns and remit tax due.

That said party has failed to file such Returns and remit tax due.

That after examining the records of the Division of Re-[fol. 5] tail Sales and Use Tax, and pursuant to the provisions of Section 6943.116, Code of Iowa, 1939, the Iowa State Tax Commission finds tax due from the above party in amount $360.00 and penalty in amount $102.96.

Wherefore It Is Ordered, that an assessment be, and hereby is made and issued against said party, in amount $360.00 tax and $102.96 penalty, and the said party be notified of this determination and assessment.

Iowa State Tax Commission signed—Fred W. Nelson Chairman.

Use Tax—(Form UT No. 522).

EXHIBIT "B" TO PETITION

Iowa State Tax Commission
Division of Retail Sales and Use Tax
Des Moines

Notice of Assessment

No. 4394

Dated October 6, 1941

00000 Minneapolis Iron Store, Minneapolis, Minnesota.

You are hereby notified of personal property use tax assessment as shown below:

Period	Unpaid Tax	Additional Tax	Penalty	Total
April 16, 1937 through Sept. 30, 1941	$360.00		$102.96	$462.96

Reason:

Because of your failure to file Retailer's Use Tax Re- [fol. 6] turns for the period beginning April 16, 1937 and ending Sept. 30, 1941, this assessment is made pursuant to Section 6943.116, Code of Iowa, 1939.

You are further notified that unless within thirty (30) days of service of this notice, you apply to the State Tax Commission for a hearing, the amount of tax written herein will become irrevocably fixed.

The amount of tax herein is based on information available to this Department. The amount of penalty written herein is computed by authority granted in Section 6943.118, Code of Iowa, 1939.

JJH:HB.

Penalty on tax accrues at the rate of 1% per month. Your remittance payable to the treasurer of the state of Iowa, should be mailed promptly to the Iowa State Tax Commission, Division of Retail Sales and Use Tax, Des Moines, Iowa.

Iowa State Tax Commission
Division of Retail Sales and Use Tax in order to insure proper credit, this notice must accompany your remittance.

EXHIBIT "B-1" TO PETITION.

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

(Signed) Minneapolis Iron Store (Signature or name of addressee) Ethyl Fall (Signature of address'es Agent).

Date of Delivery 10-7-42.

Post Office Department.

[fol. 7] Return to State Tax Commission Des Moines, Iowa.

Registered Article 143224.

Filed Polk County, Iowa, May 21, 1942, 9:35 A. M. Fred Barkalow, Clerk District Court.

Thereafter, by agreement of the parties and on motion of plaintiff, an order was entered, transferring said cause to the law docket of said court, and docketing the cause as No. 48281-91 Law. Thereafter, and on the 11th day of December, 1942, defendant filed in said cause the following verified

ANSWER

Comes now General Trading Company, defendant above named, and for answer to the petition of the plaintiff, states:

Defendant denies each, all, and every of the allegations, matters, and things in said petition set forth except as hereinafter specifically admitted.

Defendant admits the facts alleged and contained in paragraphs numbered 1, 2, 5, and 6 of said petition. Defendant further admits that two per cent (2%) of the purchase price on merchandise sold, in the manner hereinafter described, by it to persons residing within the State of Iowa during a period from April 16, 1937, through September 30, 1941, amounted to Three Hundred Sixty Dollars ($360.00).

Defendant avers that it is a corporation duly organized and existing under the laws of the State of Minnesota with its principal place of business in St. Paul in that state; that [fol. 8] it has never qualified to do business in the State of Iowa as a foreign corporation or otherwise under Iowa statutes; that it has not, during the period aforesaid, either

directly or by any subsidiary maintained any office, distribution house, sales house, warehouse, or other place of business, or any agent located in Iowa, through which it has sold tangible personal property to persons in Iowa. Defendant alleges that from time to time during the period aforesaid, defendant sent from the State of Minnesota into the State of Iowa travelling salesmen, none of whom ever lived or had headquarters in the State of Iowa; that said travelling salesmen went into the State of Iowa and solicited orders for merchandise which were expressly subject to acceptance or rejection by defendant at its office in Minneapolis, Minnesota. Said travelling salesmen made no contracts in Iowa and were not authorized to bind the defendant in any manner; that in filling such orders as were accepted by the defendant at its office in Minneapolis, Minnesota, goods and merchandise were shipped from the place of business of the defendant in Minneapolis, Minnesota, by delivery to common carriers, either by truck or rail, or by delivery to the United States Postal Department for transportation to such purchasers in the State of Iowa; such purchasers paid all costs of such transportation by such common carriers or by parcel post.

Defendant further avers that the business which it carried on, as hereinbefore alleged, constituted merely a purely interstate business; that its right to engage in such business was not dependent upon any law of or privilege extended by the State of Iowa and was not subject to regulation by the State of Iowa; that the right to engage in such business is a right conferred upon defendant by virtue of the Con- [fol. 9] stitution and laws of the United States and by the laws of Minnesota; that as applied to the transactions of the defendant hereinbefore set forth, plaintiff and the State of Iowa were, and are, wholly without jurisdiction to make any assessment against or charge upon this defendant for the privilege of carrying on such interstate business, and that if Chapter 329.4, Iowa Code of 1939, commonly known as the Iowa Use Tax Act, be construed to give the plaintiff power to make an assessment against the defendant, the said Act is void for the reason that said law violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and further violates the provisions of Section 8, Article I, of the Constitution of the United States, which vests in the Congress of the United States exclusive power to regulate commerce

with foreign nations and among the several states; that if so construed, said statute would result in the taking of property of this defendant without due process of law, contrary to and in violation of the provisions of Section 9, Article I, of the Constitution of the State of Iowa.

Defendant further avers that as applied to this defendant, the provisions of Chapter 329.4 Iowa Code of 1939, which purports to render the tax required to be collected by any retailer a debt owned by the retailer to the State of Iowa, are void because if so construed, there would thereby be vested in the State of Iowa the power to create a personal liability as to persons and corporations who are not subject to the laws of the State of Iowa and not within the jurisdiction of said state; and, therefore, deprives defendant of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United [fol. 10] States, in violation of Section 8, Article I, of the Constitution of the United States, and in violation of Section 9, Article I, of the Constitution of the State of Iowa.

Defendant further avers that it is not subject to the Use Tax Law of the State of Iowa under the provisions of Chapter 329.4, Iowa Code of 1939, since it is not a retailer maintaining a place of business in this state, and that there is no authority granted by the statutes of Iowa to plaintiff to make any assessment of said use tax against this defendant or to require defendant to collect said use tax upon sales so made by defendant in the State of Minnesota, and that said assessment is, therefore, void under the terms of the Iowa law.

Defendant avers that the enforcement of the demand of plaintiff as set forth in its petition under the facts hereinbefore admitted and alleged would result in a regulation of the conduct of defendant's business without the boundaries of the State of Iowa, and would result in the taking of property of the defendant without due process of law, all contrary to and in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and, further, would result in the unlawful regulation of and imposition of a direct tax upon sales in interstate commerce, contrary to the provisions of Section 8 of Article I of the Constitution of the United States and would result in the taking of property of this defendant without due process of law, contrary to and in violation of the pro-

visions of Section 9, Article I, of the Constitution of the State of Iowa, and further, would result in the exercise of the sovereign power of the State of Iowa beyond the boundaries thereof, as defined in the Constitution of the State of Iowa, and particularly, in the Preamble thereof.

[fol. 11] Wherefore, having fully answered the petition of plaintiff, defendant prays that said petition be dismissed and that it have judgment against the plaintiff for its costs herein.

On the same date, plaintiff filed in the office of the Clerk of the aforesaid court the following

DEMURRER TO ANSWER

Comes now the plaintiff and demurs to the answer filed by the defendant, and as grounds therefor plaintiff states:

Par. 1. That the facts stated in defendant's answer do not constitute any defense to plaintiff's cause of action, and if true, do not entitle defendant to a dismissal of plaintiff's petition in that:

(a) The answer shows on its face that the defendant in the conduct of its sales in Iowa is a "retailer" and a "retailer maintaining a place of business in this State" within the provisions of Section 6943.102, paragraphs 5 and 6 of the 1939 Code of Iowa;

(b) The answer shows on its face that the defendant is liable to the State of Iowa for the use tax assessment set forth in plaintiff's petition in that it affirmatively appears from the face of the answer that the defendant, as a "retailer" and a "retailer maintaining a place of business in this State", made the sales to Iowa purchasers, which sales are the subject of the use tax assessment, and therefore, under the provisions of the Iowa Use Tax Law, defendant is liable to the State of Iowa for said use tax assessment.

[fol. 12] On December 11, 1942, the Demurrer to the Answer of defendant came on for hearing before the District Court of Polk County, Iowa, Hon. Loy Ladd, Judge, and was fully argued by counsel for both parties and taken under advisement by the Court, with ruling to be announced at a later date. On December 30, 1942, there was filed in the office of the Clerk the following

Memorandum Opinion on Demurrer to Defendant's Answer

The plaintiff's suit is for use tax in the sum of $360.00 under the provisions of Chapter 399.4 of the 1939 Code of Iowa.

This cause is pending on plaintiff's demurrer to the answer of the defendant.

The demurrer has been argued both orally and in writing.

The facts admitted by the demurrer are that the defendant is a Minnesota corporation with its principal place of business in Minneapolis, Minnesota, and not authorized to do business in Iowa; it has salesmen in Iowa soliciting and obtaining orders from customers subject to approval and filling in Minneapolis, Minnesota, by the defendant; and when received and approved by the defendant, the merchandise is delivered by the defendant to common carriers or to the United States mail and sent direct to the purchaser,—the customer paying the transportation charges.

It is the contention of the plaintiff herein that under the facts pleaded, the defendant is a "retailer" and a "retailer maintaining a place of business in this state" within the provisions of Paragraph 5 and 6 of Section 6943.102 of the 1939 Code of Iowa, and as such has made sales to Iowa [fol. 13] purchasers, which sales are subject to Use Tax and therefore defendant is liable for such under the provisions of Chapter 329.4 of the 1939 Code of Iowa.

It is contended by defendant that the transactions carried on constituted solely interstate business; that it has a right to do so under the Constitution of Minnesota and the United States; that Iowa is wholly without jurisdiction to make any assessment or charge against the defendant for the privilege of carrying on interstate business and that if Chapter 329.4 of the 1939 Code of Iowa be construed to give plaintiff power to make an assessment against the defendant, the act is void because the law violates the due process clause of the Fourteenth Amendment and Section 8, Article I of the United States Constitution, and Section 9, Article I of the Constitution of Iowa.

In other words, the defendant pleads that the Iowa Use Tax does not include the defendant within its provisions and if it does the law is unconstitutional.

It has been conceded that the transactions involved herein are solely in interstate business.

The question as to whether the defendant comes within the definition of "a retailer maintaining a place of business in this state," as defined in the Use Tax Law is answered by paragraph 6, of Section 6943.102 of the 1939 Code of Iowa, and it is the opinion of this court that the defendant under the facts pleaded is "a retailer maintaining a place of business in this state."

If the defendant is "a retailer maintaining a place of business in this state," the next question is whether the Use Tax statute fixing liability on such retailer to collect the use tax and establishing personal liability therefor is unconstitutional as contended by the defendant.

[fol. 14] A discussion of this question by this court would very likely not add a thing to what has already been said on the constitutional questions raised.

The cases of *Felt & Tarrant v. Gallagher*, 306 U. S. 62; 83 Law Ed. 488; *Nelson v. Sears-Roebuck & Company*, 312 U. S. 359-372; 85 Law Ed. 888, and *Mono-motor Oil Company v. Johnson*, 292 U. S. 86; 78 L. Ed. 1141 seem to this court to control this case in its main aspects.

The *Felt & Tarrant* case *supra* can only be distinguished from the case at bar in that the Felt & Tarrant Company had some of its products stored in California and had general agents residing there with a part of their expenses paid and power to appoint sub-agents. In that case the court relied on three cases, to-wit: *Bowman v. Continental Oil Co.*, 256 U. S. 642. *Mono-motor Oil Company v. Johnson, supra* and *Hendifer v. Silas Mason Co.*, 300 U. S. 577; 81 Law Ed. 814. It was specifically held that the company not qualified to do business in California and taking orders through its agents in California, subject to approval by the company and when approved, shipping the goods direct to the purchasers or to agents to deliver to the customer, came within the provisions of the California Use Tax law and was not unconstitutional wherein it made the seller responsible to collect the use tax from the purchasers.

The *Sears Roebuck* case, *supra*, is only distinguishable in its facts from the case at bar in that the company had retail stores in Iowa and had qualified to transact business in Iowa. The company also transacted a mail order business through its catalogs direct between the customer and the company at its home office in Chicago, Illinois. As the [fol. 15] mail order business alone as transacted by the company in the *Nelson v. Sears-Roebuck* case, did not come

within the definition of "a retailer maintaining a place of business in this state," under paragraph 6 of Section 6943.102, the provisions of Chapter 329.4 did not apply. But it was held that the company could not separate its mail order business from its business transacted from its stores in Iowa, for the purpose of eliminating its mail order business from the operation of the use tax. Therefore, if all the business of the Sears-Roebuck Company in Iowa, both mail order and through its retail stores in Iowa is considered one business, the company came within the definition of a "retailer maintaining a place of business in this state."

In the case of *Mono-motor Oil Co. v. Johnson, supra,* the complainant there sought an injunction prohibiting tax officers from requiring the distributor of motor oil received from another state to pay the state treasurer, the tax levied upon the consumer wherein it was stated:

> "There is no substance in the claim that the statute imposes a burden upon interstate commerce * * * the statute in terms imposes the tax on motor vehicle fuel used or otherwise disposed of in the state. Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement * * *. the statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa and the requirement that the appellant as a shipper into Iowa, shall, as agent of the state report and pay the tax on the gasoline thus coming into the [fol. 16] state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant."

After a full consideration of the arguments submitted both oral and in writing, it is the opinion of the court (1) that the defendant is "a retailer maintaining a place of business in the State of Iowa," as defined in Paragraph 6 of Section 6943.102 of the 1939 Code of Iowa, and, (2) that under the decisions in the three cases above cited, the exaction by the state from the defendant to collect and pay the use tax on merchandise sold in Iowa, is a constitutional exercise of the taxing power of the State of Iowa.

The court has entered upon the motion docket, the following ruling: "December 30, 1942. The demurrer of the plaintiff to the answer of the defendant is hereby sustained. The defendant is hereby granted ten days to plead over and upon its failure so to do, judgment will be entered by the court against the defendant in the sum of $360 and costs. To all of which the defendant excepts."

(S.) Loy Ladd, Judge.

Thereafter, and on the 6th day of January, 1943, defendant, by its counsel, in open court, refused to further plead and elected to stand upon its Answer, and the defendant having refused to plead further, the Court then proceeded to hear the testimony of the plaintiff, and at the conclusion of said hearing made and entered of record the following

[fol. 17] JUDGMENT ENTRY

Be it remembered that this cause came on to be heard in the above District Court on or about the 3d day of December, 1942 upon plaintiff's Demurrer to defendant's Answer, John M. Rankin, Attorney General of the State of Iowa, and John E. Mulroney, Assistant Attorney General for the Tax Commission, appearing as counsel for plaintiff, defendant being represented by Gamble, Read, Howland and Rosenfield of the Des Moines bar.

After listening to the oral arguments of respective counsel and upon consideration of written briefs thereafter filed, the above District Court, Honorable Loy Ladd, presiding, sustained plaintiff's Demurrer to said Answer and the following calendar entry was thereupon accordingly made:

> "December 30, 1942. The Demurrer of the plaintiff to the Answer of defendant is hereby sustained. The defendant is hereby granted ten days to plead over and upon its failure so to do, judgment will be entered by the court against the defendant in the sum of Three Hundred Sixty ($360.00) Dollars and costs. To all of which defendant excepts."

Defendant, through its attorneys, has advised the court that it elects to stand upon the court's ruling on said Demurrer and therefore declines to plead further, defendant

specifically waiving the time granted to it by the court in which to plead over.

Now Therefore, on this 6th day of January, 1943, it is hereby ordered and adjudged that plaintiff have and recover of defendant the sum of $360.00 and the costs of the [fol. 18] action, taxed by the Clerk, at $.... and judgment for said sum is hereby entered in favor of plaintiff and against the defendant.

To all of which defendant duly excepts.

NOTICE OF APPEAL

Thereafter, and on the 8th day of January, 1943, defendant duly appealed to the Supreme Court of Iowa from the judgment of the Court made and entered on January 6, 1943, from the ruling of the Court sustaining the Demurrer of plaintiff to defendant's Answer, made and entered on or about December 30, 1942, and from each and every other order, entry, and finding in said cause adverse to the defendant, to the Supreme Court of the State of Iowa. Said appeal was perfected by service of a notice of appeal in writing, specifying the rulings and orders of the Court appealed from, as hereinbefore set forth, and by serving said notice of appeal upon the attorneys for plaintiff and by filing same in the office of the Clerk of the District Court of Polk County, Iowa, in due time as required by statute.

CERTIFICATE

We do hereby certify that the foregoing Abstract of Record contains all of the pleadings filed by the parties, all orders and rulings of the Court made and entered in said cause, and that the same constitutes a full, true, and complete abstract of the record in said cause in the District Court of Polk County, Iowa.

O'Brien, Horn, Stringer & Seymour, Gamble, Read, Howland & Rosenfield, Attorneys for Appellant.

[fols. 19-20] COST CERTIFICATE

We do hereby certify that the actual cost of printing the foregoing Abstract of Record was the sum of $20.00.

Gamble, Read, Howland & Rosenfield, Attorneys for Appellant.

NOTICE OF ORAL ARGUMENT

To: Charles W. Barlow, Clerk of the Supreme Court of the State of Iowa, and to State Tax Commission of the State of Iowa, Appellee; or

To: John M. Rankin, Attorney General of the State of Iowa, and Jens Grothe, Assistant Attorney General of the State of Iowa, Attorneys for Appellee:

You and each of you are hereby notified that upon the submission of this cause in the Supreme Court of the State of Iowa, appellant will be heard in oral argument.

Gamble, Read, Howland & Rosenfield, Attorneys for Appellant.

[fol. 21] IN SUPREME COURT OF IOWA

POINTS RELIED UPON FOR REVERSAL

Included in the brief of General Trading Company were the following points, relied on for reversal:

"Division II

The trial court erred in sustaining the demurrer to appellant's answer on the ground that, as applied to appellant, the imposition of a personal liability for the collection and payment of the use tax did not deprive appellant of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States (Abs. pg. 13, lines 30-35, pgs. 14, 15, 16). Due exception was taken to the ruling of the court sustaining the demurrer (Abs. pg. 16, lines 15-22).

The imposition of personal liability for the collection and payment of taxes based upon transactions beyond the borders of the state constitutes a denial of due process and a deprivation of property, in violation of the Fourteenth Amendment to the Constitution of the United States.

Dewey v. Des Moines, 173 U. S. 193, 43 L. Ed. 665.
Rhode Island Hosp. Trust Co. v. Doughton, 270 U. S. 69, 70 L. Ed. 475.
State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. Ed. 179.

Louisville & Jefferson Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. Ed. 513.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 195, 50 L. Ed. 150.

A. The mere solicitation of orders within a particular state by a non-resident person or corporation, which orders are subject to acceptance or rejection outside the state, does not constitute doing business therein so as to make the non-resident amenable to the tax laws of such state.

Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333, 69 L. Ed. 634.

Bank of America v. Whitney Central Bank, 261 U. S. 171, 67 L. Ed. 594.

People's Tobacco Co. v. American Tobacco Co., 246 U. S. 83, 62 L. Ed. 587.

[fol. 22] *Green v. C. B. & Q. Ry. Co.*, 205 U. S. 530, 51 L. Ed. 916.

Davis v. Farmers Coop. Equity Co., 262 U. S. 312, 67 L. Ed. 996.

Burnham Mfg. Co. v. Queen Stove Works, 214 Iowa 112."

(Appellant's Brief and Argument, pages 10 and 11.)

"Division III

The trial court erred in sustaining the demurrer to appellant's answer on the ground that, as applied to appellant, the provisions of the Iowa Use Tax Law did not violate Section 8, Article I, of the Constitution of the United States (Abs. pg. 13, lines 30-35; pgs. 14, 15, 16). Due exception was taken to the ruling of the court sustaining the demurrer (Abs. pg. 16, lines 15-22).

As applied to appellant, the Iowa Use Tax Law constitutes an exaction for the privilege of engaging in interstate commerce within the state of Iowa. No state has power, under the Commerce Clause of the United States Constitution, to exact a tax as a condition to engaging in interstate business. The statute, in so far as it requires appellant to collect and remit the use tax, is void under Section 8, Article I, United States Constitution.

Baldwin v. G. A. F. Seelig, 294 U. S. 511, 79 L. Ed. 1032.

Best & Co. v. Maxwell, 311 U. S. 454, 85 L. Ed. 275.
Fargo v. Stevens, 121 U. S. 230, 30 L. Ed. 888.
Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 62 L. Ed. 295.
Minnesota v. Barber, 136 U. S. 313, 34 L. Ed. 455.
Real Silk Hosiery Mills, Inc. v. City of Portland, 268 U. S. 325, 69 L. Ed. 982.
West v. Kansas Natural Gas Co., 221 U. S. 229, 55 L. Ed. 716."

(Appellant's Brief and Argument, pages 21 and 22.)

[fol. 23] Included in the Reply Brief of General Trading Company, Appellant, were the following points:

"II

The imposition of a personal liability for the collection and payment of use taxes, based upon transactions outside the state, is beyond the power of Iowa, and violates the Fourteenth Amendment to the Constitution of the United States." (Reply Brief of General Trading Company, page 9.)

"III

No state may impose, in any form, a tax upon the privilege of engaging in interstate commerce within the state. A license or privilege tax upon appellant's traveling salesmen would necessarily be a tax upon the privilege of soliciting interstate business, and, as such, violative of Section 8, Article I, United States Constitution.

Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 30 L. Ed. 694.
International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. Ed. 678.
Crenshaw v. Ark., 227 U. S. 389, 57 L. Ed. 565.
Wagner v. Covington, 251 U. S. 95, 64 L. Ed. 157.
Best & Co. v. Maxwell, 311 U. S. 454, 85 L. Ed. 275.
Simpson v. Gundry, 297 Mich. 403, 298 N. W. 81, Certiorari denied, U. S. Supreme Court.
Brown v. Simpson, 314 U. S. 674, 86 L. Ed. 539.
J. B. Simpson v. O'Hara, 277 Mich. 55, 268 N. W. 809.

Montgomery Ward & Co. v. Fry, 277 Mich. 260, 269 N. W. 166."

(Reply Brief of General Trading Company, page 15.)

RECORD OF SUBMISSION

At Book 34, Page 319, in the office of the Clerk of the Supreme Court of Iowa there appears of record the following entry, pertaining to the cause of *State Tax Commission v. General Trading Company:*

"Argued and submitted June 16, 1943."

[fol. 24] IN SUPREME COURT OF IOWA

OPINION—Filed July 27, 1943

Appeal from Polk District Court. Loy Ladd, Judge

Action to recover use taxes. Defense was that, because of defendant's method of doing business, no tax is due and, if the letter of the statute imposes a tax, the statute is unconstitutional. The tax commission filed a demurrer to the answer; the demurrer was sustained; defendant stood on the ruling, suffered judgment to be entered thereon, and appeals.—Affirmed.

O'Brien, Horn, Stringer & Seymour, of St. Paul, Minnesota, and Gamble, Read, Howland & Rosenfield, of Des Moines, Iowa, for appellant.

John M. Rankin, Attorney General of the State of Iowa; and Jens Grothe, Assistant Attorney General of the State of Iowa, for appellee.

MILLER, J.:

Plaintiff's petition asserts that defendant is a Minnesota corporation, selling merchandise under the trade name of Minneapolis Iron Store at Minneapolis, Minn.; from April 16, 1937, through September 30, 1941, defendant sold merchandise to Iowa purchasers who used and consumed same; defendant sent solicitors into Iowa who took orders from Iowa purchasers, subject to acceptance at defendant's store in Minnesota; the property was subsequently delivered upon said orders in interstate commerce to the purchasers

in Iowa; defendant thereby became a "retailer maintaining a place of business in this state" as defined by the Iowa Use Tax Law (Chapter 329.4, Code, 1939,) and was required to collect and pay to the state a use tax of 2% on the merchan- [fol. 25] dise so sold; defendant failed to collect and pay such tax; plaintiff determined the tax to be $360.00 and made an assessment accordingly; defendant was notified of such assessment and took no appeal therefrom; time for appeal has expired. The prayer demanded judgment for the use tax of $360.00 with statutory penalty and interest.

Defendant voluntarily appeared and filed answer which admitted certain allegations and denied others. Defendant admitted its corporate capacity, its place of business, the assessment of the tax, the failure to appeal therefrom, and that 2% of the purchase price of merchandise sold by defendant to residents of Iowa from April 16, 1937, through September 30, 1941, amounted to $360.00. The answer further asserted that defendant has not maintained any office, distribution house, sales house, warehouse or other place of business, or any agent located in Iowa, through which it has sold tangible personal property to persons in Iowa; from time to time during the period aforesaid, defendant sent traveling salesmen from Minnesota into Iowa, none of whom lived in Iowa or had headquarters in Iowa; such traveling salesmen solicited orders for merchandise in Iowa, which orders were subject to acceptance or rejection at defendant's office in Minnesota; the salesmen were not authorized to make and did not make any contracts in Iowa; in filling such orders as were accepted at its office in Minnesota, merchandise was shipped from Minnesota to Iowa by delivery to common carriers, truck or rail, or by delivery to U. S. Postal Dept.; the purchasers paid all costs of transportation by carrier or parcel post.

Based on the statement of facts aforesaid, the answer asserted that defendant's business was purely interstate, not dependent on any law or privilege extended by the State of Iowa and not subject to regulation by the State of [fol. 26] Iowa; defendant's right to do business was granted by the Constitution of the United States and the laws of Minnesota; plaintiff and the State of Iowa have no jurisdiction to charge defendant for the privilege of carrying on its interstate business; if the Iowa Use Tax Act be construed to give plaintiff power to make the assessment herein, the act is void because it violates the due process

clause of the 14th Amendment to the U. S. Constitution, violates Section 8, Article I of said Constitution and violates Section 8, Article I, Constitution of Iowa; defendant is not a retailer maintaining a place of business in Iowa and there is no liability to plaintiff under the terms of the act; enforcement of the assessment made by plaintiff would result in regulation of defendant's business without the boundaries of Iowa, contrary to the due process clauses aforesaid, would result in regulation of and imposition of a direct tax upon sales in interstate commerce, and the exercise of sovereign power by the State of Iowa beyond its boundaries, all in violation of the aforesaid constitutional provisions. The prayer of the answer was that the action be dismissed at plaintiff's costs.

Simultaneously with the filing of the answer, the tax commission filed a demurrer thereto, which asserted that (1) the answer shows on its face that defendant is a "retailer" and a "retailer maintaining a place of business in this state" as defined by paragraphs 5 and 6, Section 6943.102, Code, 1939; (2) the answer shows on its face that defendant, as a "retailer" and a "retailer maintaining a place of business in this state" made sales to Iowa purchasers and is liable for said use tax assessment under the provisions of the Iowa Use Tax Law.

The demurrer was duly argued and submitted; the court ordered that it be sustained; defendant refused to plead [fol. 27] further, elected to stand on the ruling, and judgment was entered for the assessment of the use tax in the sum of $360.00 and costs. Defendant has appealed to this court.

In sustaining the demurrer, the court determined that, under the allegations of the answer, defendant is a "retailer maintaining a place of business in this state" within the meaning of the use tax law. The defendant challenges such finding on four grounds, which may be classified into two, (1) that the court was wrong in interpreting the act so that it applies to defendant and (2) making the act applicable to defendant renders it unconstitutional. We find no merit in either contention.

I. The statutory provisions, interpreted by the trial court, are paragraphs 5 and 6 of Section 6943.102, Code, 1939. We think that said paragraph 5 defines a "retailer" to include anyone engaged in the business of selling at retail

tangible personal property for use in Iowa. Defendant was selling tangible personal property for use in Iowa and the sales were retail sales. Defendant was a "retailer" within the meaning of the act and does not contend otherwise. The contention is that defendant is not a "retailer maintaining a place of business in this state", as defined by paragraph 6 of said Section 6943.102.[1] The answer asserts facts from which it appears that, if the phrase were to be given its ordinary meaning, defendant is not such a retailer. But we are dealing with a statutory definition. The tax commis- [fol. 28] sion points out that the statute provides that a "retailer maintaining a place of business in this state" shall include "any retailer having • • • within this state • • • any agent operating within this state under the authority of the retailer • • • irrespective of whether such • • • agent is located here permanently or temporarily, or whether such retailer • • • is admitted to do business within this state." The language is sufficient to include defendant within the terms of the statutory definition. We cannot shut our eyes to the words of the statute. The use of the words is the prerogative of the legislature. Our own function is to interpret the words which it has used. The trial court was right in holding that defendant's operations bring it within the letter and the language of the statute.

II. This brings us to the question whether the statute, as applied to defendant herein, violates the state or federal constitutions. The tax commission places great reliance upon the cases of *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, 85 L. Ed. 888, 61 Sup. Ct. 586, and *Nelson v. Montgomery Ward & Co.*, 312 U. S. 373, 85 L. Ed. 897, 61 Sup. Ct.

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[1] Paragraph 6, Section 6943.102, Code 1939, provides: "'Retailer maintaining a place of business in this state' or any like term, shall mean and include any retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent operating within this state under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent is located here permanently or temporarily, or whether such retailer or subsidiary is admitted to do business within this state pursuant to chapter 386."

593, which cases reversed the decisions of this court in *Sears, Roebuck & Co. v. Roddewig*, 228 Iowa 1273, 292 N. W. 130, and *Montgomery Ward & Co. v. Roddewig*, 228 Iowa 1301, 292 N. W. 142. The writer of this opinion was the author of the majority opinions of this court in those cases. Were it not for the lessons learned in that experience, the arguments of counsel for defendant herein might be more persuasive and convincing.

In the *Sears, Roebuck* and *Montgomery Ward* cases, *supra*, the question was whether the use tax law applied to mail order sales of tangible personal property for use in Iowa when the sales were completed outside of Iowa. This court, dividing five to four, held that it did not. The U. S. Supreme Court, dividing five to two, held that it did. In [fol. 29] those cases, the retailers were doing business in Iowa. The tax commission threatened to cancel their licenses to do business here if the use taxes on such mail order business were not collected and paid. There was a means of enforcement available there that is not present here. On that feature of the case, the majority opinion in the *Sears, Roebuck* case states, at page 364 of 312 U. S., as follows:

"But respondent insists that * * * there is no local activity by respondent which generates or which relates to the mail orders here involved. Yet these orders are still a part of respondent's Iowa business. The fact that respondent could not be reached for the tax if it were not qualified to do business in Iowa would merely be a result of the 'impotence of state power'. *Wisconsin v. J. C. Penny Co.*, 311 U. S. 435, ante, 267, 61 S. Ct. 246, 130 A. L. R. 1229, supra. Since Iowa has extended to it that privilege, Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business. Cf. *Wisconsin v. J. C. Penny Co., supra.* Respondent cannot avoid that burden though its business is departmentalized. Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts."

Counsel for defendant urge that the reference to the "impotency of state power" means constitutional impotency and is, therefore, authority for a reversal herein. We cannot agree with such contention. Justice Douglas was re- [fol. 30] ferring to language of Justice Frankfurter in the *J. C. Penny Co.* case there cited. In that case, Justice Frankfurter states, at pages 444 and 445 of 311 U. S., as follows:

"Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. 'Taxable event,' 'jurisdiction to tax,' 'business situs,' 'extraterritoriality,' are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction."

We are unable to interpret the language of Justice Douglas and Justice Frankfurter, above quoted, as committing the U. S. Supreme Court to any principle which would sustain defendant's contentions herein. This language, [fol. 31] considered with the decisions of the court in the *Montgomery Ward* case, *supra*, the case of *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62, 83 L. Ed. 488, 59 Sup. Ct. 376, and the decisions on which that case relies, would seem to be decisive against defendant herein.

In the *Felt & Tarrant* case, the operations of the retailer were very similar to those of defendant herein, except that

the general agents, who solicited orders to be accepted or rejected outside of California, were residents of California, and had permanent offices there. The company sought to enjoin collection of the California use tax. The action was dismissed. On appeal the judgment was affirmed. The court, per Justice McReynolds, states, at page 66 of 306 U. S., as follows:

"The argument is this—

"The appellant, an Illinois corporation, carried on no intrastate operations in California and is not subject to its jurisdiction. Such business as it transacts in California is interstate in character. California, therefore, lacks the power to require it (1) to act as the state's collecting agent with respect to use tax which may become due from California storers, users or consumers, or (2) to insure payment of such tax if it fails to make collections from the tax debtors, or (3) otherwise to act as a 'retailer' as defined by the Act and the appellees. The treatment of the appellant as a retailer subject to the provisions of the California Use Tax Act is a direct burden upon interstate commerce prohibited by the Federal Constitution. Numerous provisions of the statute, if applied, would deprive appellant of its property without due process of law.

"The trial court thought that both contentions were foreclosed by what was said and ruled in *Bowman v. Continental Oil Co.*, 256 U. S. 642, 650, 65 L. Ed. 1139, 1145, [fol. 32] 41 S. Ct. 606; *Monamoter Oil Co. v. Johnson*, 292 U. S. 86, 93, 95, 78 L. Ed. 1141, 1147, 1148, 54 S. Ct. 575; and *Henneford v. Silas Mason Co.*, 300 U. S. 577, 582, 583, 81 L. Ed. 814, 818, 819, 57 S. Ct. 524. And we agree with that conclusion."

The opinion then reviews the cases above cited and quotes from some of them. From the *Silas Mason Co.* case, the court quotes from 300 U. S. 582, 583, as follows:

"The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end. * * * A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate."

From the *Monamoter Oil Co.* case, the court quotes the interpretation of the Iowa statute here in question, (292 U. S. 95), as follows:

"The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant."

In the *Montgomery Ward* case, the *Felt & Tarrant* case is expressly followed, the court stating, at page 376, of 312 U. S., as follows:

"It was stipulated that 'advertisements have been caused to be printed by the retail stores of the petitioner (Montgomery Ward & Co.) in the State of Iowa, advertising not only retail merchandise, but the ability to complete service through the use of the catalog.' This stipulation clearly means that respondent has solicited mail order sales in [fol. 33] Iowa. The fact that that solicitation was done through local advertisements rather than directly by local agents as in *Felt & T. Mfg. Co. v. Gallagher*, 306 U. S. 62, 83 L. Ed. 488, 59 S. Ct. 376, is immaterial. Nor is it material that the orders were filled by direct shipments from points outside the state to purchasers within the state. For that method of delivery also obtained in case of some of the orders involved in *Felt & T. Mfg. Co. v. Gallagher, supra.*"

The trial court interpreted the foregoing pronouncements as conclusive against defendant's contentions. We agree with the trial court. These decisions are directly opposed to the contention that the imposition of personal liability for the collection of taxes upon transactions beyond the borders of the state violates the due process clause of the 14th Amendment to the U. S. Constitution and the contention based on the fact that the sales were made in interstate commerce. The tax is not on the transaction or sale but is on the use of the article after it is acquired for use in Iowa through a sale in interstate commerce. If the collection of such a tax may be required in the event of a mail order sale consummated outside of Iowa, as in the *Sears, Roebuck* case, there is no constitutional limitation on the

applicability of the tax where the order is solicited in Iowa but the sale is completed outside of Iowa. Such was the express holding in the *Montgomery Ward* and the *Felt & Tarrant* cases. Defendant contends that the tax is an exaction for the privilege of engaging in interstate business. Such is not the holding in the cases above quoted. The *Montgomery Ward* case, the *Sears, Roebuck* case, the *Felt & Tarrant* case and the *Monamotor Oil Co.* case all involved interstate commerce. In three of them, the Iowa statute now before us was involved. The statute was sustained in each instance.

[fol. 34] In several of the cases above quoted from, the Supreme Court of the United States emphasized that the use tax is complementary to the retail sales tax. Retailers selling tangible personal property for use in Iowa are liable for a sales tax of 2% of the purchase price if the sale takes place in Iowa. Division IV, Chapter 329.3, Code, 1939. If the retail sales tax is collected and paid, no use tax is due. Paragraph 1, Sec. 6943.104, Code, 1939. But if the sale is made under such circumstances that the retail sales tax is not due, then there is a price differential in the amount of the sales tax which the use tax seeks to offset. By compelling defendant to collect and pay the use tax, the tax commission seeks to compel defendant to operate on an equality with the retailers in Iowa who, as a part of their business operations, collect and pay the retail sales tax on all sales made by them. The justice of such equality undoubtedly accounts in large measure for the liberality of the court in undertaking to sustain use tax statutes. This liberality has necessitated considerable reorientation in this field of constitutional law. Much of the argument of counsel would be quite persuasive and convincing had the U. S. Supreme Court adopted the dissenting opinion in the *Sears, Roebuck* case, written by Justice Roberts, with whom Chief Justice Hughes concurred. But the court determined otherwise. A precedent has been established which we are bound to follow. The trial court was right in so doing. The judgment must be and it is—AFFIRMED.

Oliver, Hale, Garfield, Smith, Bliss, Wennerstrum, and Mantz, J. J., concur.

Mulroney, C. J., takes no part.

[fol. 35] IN SUPREME COURT OF IOWA

JUDGMENT ENTRY—July 27, 1943

46273

"STATE TAX COMMISSION OF THE STATE OF IOWA, Appellee,

v.

GENERAL TRADING COMPANY, a Corporation, d/b/a MINNEAPOLIS IRON STORE, Appellant.

Appeal from Polk County District Court

In this cause, the Court being fully advised in the premises, file their written opinion Affirming the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and it is here Affirmed, and that a writ of procedendo issue accordingly.

It is further considered by the Court that the Appellant pay the costs of this appeal, taxed at $51.75 and that execution issue therefor."

IN SUPREME COURT OF IOWA

CERTIFICATE OF CLERK

I, Charles W. Barlow, Clerk of the Supreme Court of the State of Iowa, do hereby certify that the within and foregoing constitutes a true and correct copy of the record in the case of *State Tax Commission of the State of Iowa, Appellee, v. General Trading Company, a Corporation, doing business as Minneapolis Iron Store, Appellant*, No. 46273; that the same contains the abstract of record, the specification of points relied upon for reversal, as set forth in the brief and argument of General Trading Company, together with the record of the submission, opinion, decision, and final judgment rendered by the Supreme Court of Iowa in said cause, and I do hereby certify that the within and [fols. 36-37] foregoing is a true and exact copy of the matters herein certified as the same remain of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of my office at Des Moines, Iowa, this 24th day of September, 1943.

Chas. W. Barlow, Clerk of the Supreme Court of the State of Iowa. (Seal.)

[fol. 38] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 22, 1943

The petition herein for a writ of certiorari to the Supreme Court of the State of Iowa is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 311, which is also placed on the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 47,934, Iowa Supreme Court, Term No. 441. General Trading Company, a Corporation doing business as Minneapolis Iron Store, Petitioner, vs. State Tax Commission of the State of Iowa. Petition for a writ of certiorari and exhibits thereto. Filed October 19, 1943. Term No. 441 O. T. 1943.

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 441

GENERAL TRADING COMPANY, a corporation doing business as MINNEAPOLIS IRON STORE,

Petitioner,

vs.

STATE TAX COMMISSION OF THE STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

and

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1943.

No. .....

GENERAL TRADING COMPANY, a corporation doing business as MINNEAPOLIS IRON STORE,

Petitioner,

vs.

STATE TAX COMMISSION OF THE STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

MAY IT PLEASE THE COURT:

The petition of General Trading Company, doing business as Minneapolis Iron Store, petitioner above named, respectfully shows:

A.

A SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

The question presented is the validity of the use tax law of Iowa as applied to the particular sales here. The Iowa

use tax law imposes a tax on the use of personal property purchased for the use in Iowa, and provides that such tax shall be collected when sold by a "retailer maintaining a place of business in this State," and makes *the retailer personally liable therefor.*

This is the same tax law that was involved in *Nelson vs. Sears, Roebuck & Company,* 312 U. S. 359, and *Nelson vs. Montgomery Ward & Company,* 312 U. S. 373.[1] The law itself is to be found in Sections 6943.102-6943.125 of the Iowa Code of 1939. It is reproduced in the appendix to this brief, pages 22-26.

By the decision below, the Supreme Court of Iowa held that petitioner was a "retailer maintaining a place of business in this State" within the statutory definition contained in the use tax law.[2] That question is, of course, not open here, since that is purely a State question.

Petitioner is a Minnesota corporation, with principal place of business at Minneapolis, Minnesota. It is not admitted to do business in Iowa, and it has no office, agent, or place

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[1] In *Nelson vs. Sears, Roebuck & Company,* 312 U. S. 359, (361), this Court summarized the terms of this law as follows:

"The Iowa Use Tax is complementary to the Iowa Retail Sales Tax. Ia. Code 1939, § 6943.074, et seq. It is a tax on the use in Iowa of tangible personal property at the rate of two per cent of the purchase price. 'Use;' so far as material here, is defined as 'the exercise by any person of any right or power over tangible personal property incident to the ownership of that property.' § 6943.102. While the tax is imposed on 'every person using such property within this state until such tax has been paid' (§ 6943.103), it is further provided (§ 6943.109) that every 'retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state . . . shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser . . .' By § 6943.112 the tax constitutes a 'debt owed by the retailer' to the state. And if the retailer fails to collect the tax, etc., his retailer's permit (§ 6943.084) may be revoked; and in case of a foreign corporation, its permit to do business in the state as well. § 6943.122."

[2] For this statutory definition see paragraph 6, of Section 1, of the Law. Appendix, page 23 (R. 27, foot note).

of business and does no business in that State.[3] Its business is largely dealing in wholesale iron and steel and automobile accessories, which it sells, among others, to retailers in Iowa. Such sales and the properties covered are concededly not within the Iowa use tax. It occasionally sold its products to persons living in Iowa who were not retailers, but bought them for their own use, and the Iowa Supreme Court held petitioner liable for the use tax upon the products so sold. No question is raised as to the amount of the tax, if petitioner is liable for any of it.

Petitioner sent its traveling solicitors or drummers into Iowa. None of them either lived in Iowa or had quarters there. There they obtained the tentative orders which they were without authority to accept, and did not accept. These orders were transmitted to the head office in Minneapolis, and if the customer's credit was acceptable, and he was otherwise a desirable customer, the tentative order was accepted at Minneapolis, and the goods shipped either by railway, bus, or parcel post, at the expense of the customer, to the customer's place of business or residence in Iowa (R. 7-10).

The Iowa Tax Commission assessed petitioner for this use tax, which it refused to pay, and brought suit in Iowa to collect the tax (R. 1-6). For the purpose of determining an important Federal question petitioner appeared voluntarily and set up in detail exactly how these sales were made

[3] As previously stated, the Iowa Supreme Court held that because petitioner had sent drummers into Iowa to solicit sales, it was a retailer under the definition contained in the statute, but the conclusion was reached because it had an "agent operating within this State under authority of the retailer," and one who was located in Iowa "temporarily." However, statutory definitions do not control constitutional questions, and it will not, we believe, be claimed that petitioner was doing business in Iowa in any real sense under the decisions of this Court, apart from the statutory definition. The Iowa Supreme Court so held (R. 27).

(R. 7-11). The Tax Commission demurred to petitioner's answer (R. 11), and the District Court sustained the demurrer (R. 12-16). Petitioner refused to plead further and judgment was entered against it for the amount of the tax (R. 17-18). Petitioner appealed to the Supreme Court of Iowa (R. 18), where the judgment was affirmed by the full Bench (R. 24-35).

In its answer, to which the demurrer was sustained, petitioner specifically set up and claimed:

(1) That the sales were made wholly outside of the State of Iowa and the property delivered to the customer outside such State, and, hence, the imposition of such tax constituted a violation of the due process clause of the Fourteenth Amendment (R. 8-10).

(2) That the transaction was one wholly in interstate commerce, and, hence, the State of Iowa had no right or jurisdiction to impose a tax thereon, and that the imposition of such tax violated the commerce clause (R. 8-10).

These contentions were renewed in the Iowa Supreme Court (R. 21-23), where they were rejected.

B.

STATEMENT DISCLOSING THE BASIS OF THIS COURT'S JURISDICTION TO REVIEW THE JUDGMENT.

The judgment sought to be reviewed was entered by the Supreme Court of Iowa, which is the highest Court of that State in which a decision in this suit could be had, and such judgment is the final judgment in such suit. In said suit, there was brought in question the validity of the use tax law

of Iowa on the ground of its being repugnant to Article I, Section 8, Clause 3 (the Commerce Clause) of the Constitution of the United States, and to the due process clause of the Fourteenth Article of Amendment to said Constitution. There was specially set up and claimed by petitioner an immunity under said provisions of the Constitution, and the decision of the Supreme Court of Iowa was in favor of the validity of said statute and against the immunity so specially set up and claimed. This Court, therefore, has jurisdiction to review said judgment under Section 237, as amended, of the Judicial Code (18 U. S. Code, 344b).

C.

QUESTIONS PRESENTED:

(1) Whether the imposition by the State of Iowa of a tax for the use of the property here involved *violates the due process clause of the Fourteenth Article of Amendment to the Constitution of the United States*, since petitioner performed no act taxable within the State of Iowa, and had no property taxable therein, and all orders were accepted and the property actually delivered outside the State of Iowa.

(2) Whether the imposition by the State of Iowa of a tax upon petitioner for the use of the property here involved *violates the commerce clause of the Constitution of the United States (Article I, Section 8, Clause 3)*, when petitioner's sole activity was to send solicitors into the State of Iowa and thereafter make the shipment into Iowa from outside the State, and the orders were accepted and the property actually delivered in Minnesota.

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) Because the decision below by the Supreme Court of Iowa is in direct conflict with the decision of the Supreme Court of Michigan in *Simpson vs. Gundry*, 297 Mich. 403, 298 N. W. 81, certiorari denied, *sub. nom. Brown vs. Simpson*, 314 U. S. 674. The Michigan Supreme Court held its use tax invalid under the Federal Constitution as applied to the identical state of facts under which Iowa sustained its tax. The decision below is probably in conflict with the decision by the Supreme Court of Arkansas in *McLeod vs. J. E. Dilliworth Company*, 171 S. W. (2d) 62 (not yet reported in the Official Arkansas Reports).

(2) Because there are a large number of States in addition to Iowa and Michigan which have similar use tax laws, and it is essential that it be authoritatively determined whether, under the circumstances here involved, a State can levy such a tax. The next State Court which decides the question may conclude to follow the Michigan Supreme Court or it may conclude to follow the Iowa Supreme Court.

(3) Because the Supreme Court of Iowa has decided a Federal question of substance not heretofore specifically determined by this Court, and has decided it in a way probably not in accord with the applicable decisions of this Court.

WHEREFORE, Petitioner prays that a writ of certiorari be issued by this Court, directed to the Supreme Court of the State of Iowa, commanding that Court to certify to this Court for its review a transcript of the record in case num-

bered and entitled on its docket 46273, State Tax Commission of the State of Iowa, Appellee, vs. General Trading Company, a corporation, d/b/a Minneapolis Iron Store, Appellant, and that said judgment of the Supreme Court of Iowa be reversed, and that petitioner have such other and further relief as may be proper.

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A. B. HOWLAND,
Des Moines, Iowa,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1943.

No. .....

GENERAL TRADING COMPANY, a corporation doing business as MINNEAPOLIS IRON STORE,

Petitioner,

vs.

STATE TAX COMMISSIONER OF THE STATE OF IOWA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

A.

The decision of the Supreme Court of Iowa is to be found in *State Tax Commission of Iowa vs. General Trading Company*, ... Iowa, ..., 10 N. W. (2) 659 (July 27, 1943). At the time of the preparation of this brief, it has not appeared in the official Iowa reports. It is to be found in the record (R. 24-34).

B.

The judgment by the Supreme Court of Iowa sought to be reviewed here was entered July 27, 1943.

C.

STATEMENT OF FACTS.

The facts are stated in the Petition for Certiorari, beginning on page 1.

D.

ASSIGNMENTS OF ERROR.

The Court below, the Supreme Court of Iowa, erred:

(1) In holding that the use tax law of Iowa, as applied to the facts here, did not violate the due process clause of the Fourteenth Amendment to the United States Constitution.

(2) In holding that the use tax law of the State of Iowa, as applied to the facts here, did not violate the commerce clause of the United States Constitution, to-wit: Article I, Section 8, Clause 3.

(3) In sustaining the Tax Commission in assessing a tax against petitioner under the Iowa use tax law as against the foregoing objections.

E.

SUMMARY OF ARGUMENT.

The Supreme Court of Michigan decided the Federal question indicated in the foregoing assignments of error directly contra to the decision of the Court below. This Court denied certiorari in the Michigan case. Because of these divergent conclusions on Federal questions, a writ of certiorari should be granted here. The use tax law of Iowa, as applied to the facts here, and the imposition of a tax against petitioner thereunder, violates both the Fourteenth Amendment and the commerce clause.

F.

ARGUMENT.

(a)

The Supreme Courts of Iowa and Michigan Have Arrived At Opposite Conclusions On the Same Federal Question.

The Supreme Court of Iowa deemed that this case was controlled by *Nelson vs. Sears, Roebuck & Company,* 312 U. S. 359, and *Nelson vs. Montgomery Ward & Company,* 312 U. S. 373. The Michigan Supreme Court held that these cases were not applicable, to a *similar Michigan Tax* imposed under identical circumstances.

Simpson vs. Grundy, 297 Mich. 403, 298 N. W. 81.

Nobody now disputes the right of the State to tax the user within the State on the use of property even though that

property comes from another State. *Henneford vs. Silas Mason Company*, 300 U. S. 577.

The right of a State to require a foreign corporation, *actually doing business within such State* (whether formally licensed to do business or not), to act as a collecting agent of the State for the purposes of the use tax is no longer open to question since the *Sears, Roebuck* case. This seems to be true whether or not the particular sales are brought about by the business done within the State. *Monamotor Oil Company vs. Johnson*, 292 U. S. 86; *Nelson vs. Sears, Roebuck & Company*, supra; *Nelson vs. Montgomery Ward & Company*, supra. *Felt & Tarrant Mfg. Co. vs. Gallagher*, 306 U. S. 62. In all these cases the corporation was *actually doing business in the state.*

But here we have a situation where (1) solicitors were sent into Iowa who solicited an order for the sales, but did not make them; (2) the orders were accepted and sales were actually made outside the State and the property delivered outside the State by delivery to a common carrier, the purchaser paying the freight; (3) petitioner was not doing business in Iowa, and was not licensed so to do.

Thus, any "taxable event" (*McGoldrick vs. Berwind-White Coal Mining Company*, 309 U. S. 33) in Iowa, so far as petitioner is concerned, is to be found in the fact that either (1) solicitors went into Iowa to conduct preliminary negotiations, or (2) petitioner delivered the property to a common carrier outside the State to be transported into the State at the expense of the purchaser.

Apparently the State does not claim that it could tax petitioner for sending solicitors into Iowa. In the Court below, it expressly disclaimed this idea. This will be dis-

cussed later. Nor does it apparently claim that it could tax petitioner for shipping the goods from outside the State into the State. This will likewise be further discussed.

What is apparently claimed is that a tax may be levied upon the use of the property in Iowa after it arrives at destination, and that because that tax is designated a use tax, the State can compel the petitioner who is not in Iowa to pay a tax upon the use some on else thereafter makes of the property in such State. The Supreme Court of Iowa so held. It is submitted that in so holding it erred.

Attention should be called to the divergent results reached by the Supreme Courts of Iowa and Michigan. Both cases involved identical facts, i. e., a solicitor or drummer conducting preliminary negotiations within the State, acceptance of the preliminary order outside the State, and a shipment thereafter into the State. Both cases were decided after the *Sears, Roebuck* and *Montgomery Ward* cases.

Yet, the Supreme Court of Michigan denounced the imposition of such a use tax as a violation of the Federal Constitution in *Simpson vs. Gundry*, 297 Mich. 403, 298 N. W. 81, while the Iowa Supreme Court below here upheld the tax as against identical objections. *State Tax Commission vs. General Trading Co.*, 10 N. W. (2) 659.

While the rules of this Court do not expressly recognize a difference of opinion on the same question between State Supreme Courts as being a ground for certiorari, yet where, as here, two State Supreme Courts have decided an important Federal question with opposite results, it is submitted that there is just as much reason for granting certiorari as when two Federal Courts of Appeal have differed.

This Court denied certiorari in the Michigan case in *Brown*

vs. Simpson, 314 U. S. 674.[4] While, of course, under the frequent pronouncements of this Court this denial of certiorari does not necessarily constitute an approval of the Michigan case, yet, unless this Court grants certiorari here, the result will be that in Michigan the imposition of such a use tax violates the Federal Constitution, but that it does not violate it in Iowa, and that the Supreme Courts of the other States having such use tax laws may follow either decision as they may see fit. Since it is the Federal Constitution which is being considered, this Court should settle the question for all time.

The decision in the case at bar is probably also opposed to that of the Supreme Court of Arkansas in *McLeod vs. J. E. Dilworth Company*, 171 S. W. (2d) 62 (not yet reported in the Official Arkansas Reports). There the Supreme Court of Arkansas held that a certain tax which was called a "gross receipts tax" was in fact not a use tax, but a retail sales tax, and that as such it violated the commerce clause. There the method of doing business was identical with that here. A traveling salesman who lived in Tennessee took tentative orders in Arkansas. These were accepted at the home office in Tennessee, and the goods were shipped by common carrier from Tennessee at the expense

[4]It may be claimed that the Michigan Supreme Court decided its case on both a Federal and a non-Federal ground, and that this was the reason for this Court denying certiorari. We doubt that this conclusion can be drawn from its opinion, but however that may be, it is clear that the Michigan Supreme Court did decide the case, in part at least, on a Federal ground, because it said:

> "In the case at bar *the State seeks to impose a burden on interstate commerce*, not in any manner connected with intrastate commerce, and *this may not be done*.
>
> * * * * *
>
> "So disassociated, *the business is strictly interstate commerce upon which the State may not impose the burden of the use tax* or compel plaintiff to collect the same." (298 N. W. 81 (83), 297 Mich. 403, (409).

In this respect, it reached a conclusion diametrically opposed to the conclusion of the Iowa Court below.

of the purchaser. The seller was not doing business in Arkansas. The Supreme Court of Arkansas said:

> "To conclude, we hold herein:
>
> "(1) that the tax involved is a sales tax, and (2) that as a sales tax *it would be a burden on interstate commerce* for the tax to be imposed and collected under the facts in these cases."

It is, we think, clear that the Iowa Supreme Court misinterpreted the *Sears, Roebuck* and *Montgomery Ward* cases, and misunderstood the basic reasons behind them. The real reason for these decisions is as follows:

The defendants were foreign corporations admitted to do business in the State of Iowa, and maintained in Iowa retail stores. As a price to be paid for the privilege of doing business in Iowa, the burden of collecting the use tax could be imposed. This is demonstrated by the language of the Court in the *Sears, Roebuck* case as follows:

> "Since Iowa has extended to it that privilege (doing business in the state), Iowa can exact this burden (i. e., compel it to act as the collecting agent of the state) as a price of enjoying the full benefits flowing from its Iowa business." (364)

The same rule probably applies where the corporation is *actually doing business* without being formally licensed. *Monamotor Oil Company vs. Johnson*, supra. *Felt and Tarrant Mfg. Co. vs. Gallagher*, supra. But where, as here, a corporation is neither licensed to do business in a State nor, in fact, doing any business therein except the solicitation of orders in interstate commerce, the State cannot levy such a tax due to "impotence of state power." It

may be claimed as the Iowa Supreme Court intimated (R. 29-30), that this Court used the term "impotence" as meaning impotence of State power to collect the tax, and not impotence to levy the tax, but a further reading of the opinion clearly discloses that this Court did not use the words "impotence of state power" in that sense. This Court said:

> "It points to the fact that in its mail order business it is in competition with out-of-state mail order houses *which need not and do not collect the tax on their Iowa sales.* But those other concerns *are not doing business in the state as foreign corporations. Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price*" (365).

As we read the *Sears, Roebuck* and the *Montgomery Ward* decisions, this Court in no way disapproved of the propositions of law laid down in Mr. Justice Roberts' dissenting opinion. This Court merely held those propositions were inapplicable to the case for the sole and only reason that there the foreign corporations had been licensed to transact business in Iowa, and were in fact transacting business, and, hence, were liable for the tax.[5]

[5]The cases of *Wisconsin vs. J. C. Penny Company*, 311 U. S. 435, and *State Tax Commission of Utah vs. Aldrich*, 316 U. S. 174, while differing somewhat from the case at bar, on the facts, were decided on this same theory.

In the *J. C. Penny* Case this court said:

> "The simple but controlling question is whether the state has given anything for which it can ask return. *The substantial privilege of carrying on business in Wisconsin*, which has here been given, *clearly supports the tax*, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders." (443)

In the *Utah Tax Commission* case, the court said:

> "Suffice it to say that if that freedom of transfer exists as respondents claim, it stems from Utah law. It finds its ultimate source in the authority which Utah has granted. *It is indeed a benefit which Utah has bestowed. For it alone Utah may constitutionally ask a return.*" (180)

If this is not what the *Sears, Roebuck* and *Montgomery Ward* decisions mean, then since these cases involved shipments by mail into Iowa, they must mean that anyone in the United States from Maine to California (even though he has never been in, or had any representative, solicitor, or drummer within the State of Iowa), who sends by mail or otherwise into Iowa any tangible property which the purchaser intends to use therein, must pay to the State of Iowa the use tax thereon. We do not believe that this Court intended to commit itself to any such doctrine or theory. And, yet, the only difference between the case at bar and the supposed case lies in the fact that here drummers entered the State of Iowa, who took tentative orders, but did not accept them. As presently to be pointed out, however, the right to send these drummers into the State did not arise under or by reason of any Iowa law, but was a right which petitioner possessed under the Federal Constitution, which Iowa had no right to control.

(b)

This Tax Violates the Fourteenth Amendment.

While the Iowa law in terms applies to all sales "whether within or without the State" (Sec. 8), unless, as previously pointed out, a foreign corporation is licensed to do business in a State (or is actually doing business there without a license), the State cannot tax any of its transactions or properties beyond the borders of the State. Such a tax violates the due process clause.

Frick vs. Pennsylvania, 268 U. S. 473.

Connecticut General Life Insurance Company vs. Johnson, 303 U. S. 77.

Rhode Island Hospital Trust Company vs. Doughton, 270 U. S. 69.

The converse apparently deducible from the *Sears, Roebuck, Montgomery Ward* and *J. C. Penny Co.* cases is that where a foreign corporation is *licensed by the State to transact business therein or is actually transacting business*, the State may, as a condition to permitting it to so transact business, even require the corporation to pay taxes on transactions beyond the State's jurisdiction.

The fact that petitioner sent solicitors into the State without authority to consummate contracts, but merely to solicit tentative orders, does not constitute doing business within the State.

Green vs. C. B. & Q. Ry. Co., 205 U. S. 530.

People's Tobacco Company vs. American Tobacco Company, 246 U. S. 79 (87).

Philadelphia & Reading Railway Company vs. McKibbin, 243 U. S. 264 (268).

There is no question but that these sales were consummated in Minnesota, where the orders were accepted and where delivery was made to a common carrier. *United States vs. Andrews & Co.*, 207 U. S. 229; *D. L. & W. Ry. Co. vs. U. S.*, 231 U. S. 363 (371). Neither of these constitutes a "taxable event" in Iowa, and, hence, since petitioner was not transacting business in Iowa, this tax violates the due process clause. *Connecticut General Life Insurance Co. vs. Johnson*, supra.

(c)

The Tax Violates the Commerce Clause.

Solicitation of the sale of goods for an interstate commerce sale is a part of interstate commerce.

Robbins vs. Shelby County Taxing District, 120 U. S. 489.

Caldwell vs. North Carolina, 187 U. S. 622.

Gwin, White & Prince, Inc. vs. Henneford, 305 U. S. 434 (437).

Such solicitation of goods for an interstate commerce sale cannot be taxed by the State. *Robbins vs. Shelby County Taxing District*, supra.[6] There, this Court denounced a license or privilege tax on traveling salesmen or drummers not having a regular licensed house of business within the taxing district. The Court there said:

> "*Interstate commerce cannot be taxed at all*, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." (497)

[6]The cases following the Robbins case are to be found in a note on page 56 to *McGoldrick vs. Berwind-White Coal Mining Company*, 309 U. S. 33. Since, however, Iowa has not attempted to tax this activity, but taxes only the use by someone else of goods, sold through this activity, it is unnecessary to consider the suggestion in that note that all of these cases could have been decided on the theory that the tax was an instrument of discrimination against interstate commerce. See, also, *Best & Company vs. Maxwell*, 311 U. S. 454, which was expressly decided on the theory that there was in fact an actual discrimination against interstate commerce.

Nor is it important to consider the effect of the statement of this Court in the *Berwin-White* case (309 U. S. 33 (57)), that the *rule* in the Robbins case "has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders," since, as indicated, Iowa has not by this law attempted to tax such solicitation evidently on the theory that it could not do so.

In *Adams Manufacturing Company vs. Storen*, 304 U. S. 307, 312, this Court said:

> "The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction, but it is settled that *this will not save the tax if it directly burdens interstate commerce.*"

To sustain this tax against petitioner on the theory that its solicitors or drummers entered the State of Iowa without making any binding contracts is clearly to tax an interstate activity, the right to engage in which is granted to petitioner under the Federal Constitution, and is in no sense dependent upon any law of the State of Iowa.

Gibbons vs. Ogden, 9 Wheat. 1.

Alpha Portland Cement Co. vs. Massachusetts, 268 U. S. 203.

In the *Berwind-White* case (309 U. S. 33 (57)), this Court said:

> "It is true that a state tax upon the operations of interstate commerce measured *either by its volume or the gross receipts derived from it* has been held to infringe the commerce clause * * *."

The validity of this tax must, therefore, rest upon the fact that petitioner shipped these goods from Minnesota into Iowa.

This is likewise an activity granted under the Federal Constitution, and in no way dependent upon Iowa law. It, hence, cannot be taxed by Iowa, since it is clearly interstate commerce.

Ozark Pipe Line Corporation vs. Monier, 266 U. S. 555.

Heyman vs. Hayes, 236 U. S. 178.

In *Gwin, White & Prince, Inc., vs. Henneford,* supra, this Court denounced a Washington tax laid on the business of marketing fruit shipped out of Washington, including the solicitation of sales (437).

For other cases striking down laws purporting to tax interstate commerce, see:

International Text Book Co. vs. Pigg, 217 U. S. 91.

Fisher's Blend Station vs. State Tax Commission, 297 U. S. 650.

Puget Sound Stevedoring Co. vs. State Tax Commission, 302 U. S. 90.

(d)

CONCLUSION.

In the last analysis, therefore, this case boils down to this: Can Iowa levy a use tax *against petitioner,* who is not doing business in Iowa, for the use someone else makes of the properties in Iowa after they are delivered by petitioner to the purchaser in Minnesota, and later used by him in Iowa? It is submitted that Iowa cannot do this, and a writ of certiorari to its Supreme Court should be granted.

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APPENDIX.

(Iowa Use Tax Law)

Be It Enacted by the General Assembly of the State of Iowa:

Section 1. (Sec. 6943.102 Code 1939.) The following words, terms and phrases when used in this act shall have the meanings ascribed to them in this section:

1. "Use" means and includes the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include processing, or the sale of that property in the regular course of business. Property used in "processing" within the meaning of this subsection shall mean and include (1) any tangible personal property including containers which it is intended shall, by means of fabrication, compounding, manufacturing, or germination, become an integral part of other tangible personal property intended to be sold ultimately at retail, (2) fuel which is consumed in creating power, heat or steam for processing or for generating electric current, (3) industrial materials and equipment, which are not readily obtainable in Iowa, and which are directly used in the actual fabricating, compounding, manufacturing or servicing of tangible personal property intended to be sold ultimately at retail.

(Paragraphs 2, 3, and 4, Sec. 1, omitted.)

5. "Retailer" means and includes every person engaged in the business of selling tangible personal property for use within the meaning of this act; provided, however, that when in the opinion of the commission it is necessary for the efficient administration of this act to regard any sales

men, representatives, truckers, peddlers or canvassers, as the agents of the dealers, distributors, supervisors, employers or persons under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers, or persons, the commission may so regard them and may regard the dealers, distributors, supervisors, employers, or persons as retailers for purposes of this act.

6. "Retailer maintaining a place of business in this state" or any like term, shall mean and include any retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent operating within this state under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent is located here permanently or temporarily, or whether such retailer or subsidiary is admitted to do business within this state pursuant to chapter three hundred eighty-six (386), code, 1939.

(Paragraphs 7, 8, 9, Section 1, omitted.)

Sec. 2. (Code Sec. 6943.103.) An excise tax is hereby imposed on the use in this state of tangible personal property purchased on or after the effective date of this act (April 16, 1937) for use in this state, at the rate of two per cent of the purchase price of such property. Said tax is hereby imposed upon every person using such property within this state until such tax has been paid directly to the county treasurer, to a retailer, or to the commission as hereinafter provided.

(Sec. 3, omitted.)

(Sec. 4, omitted.)

Sec. 5. (Code Sec. 6943.106.) The tax herein imposed shall be collected in the following manner:

(Par. 1, Sec. 5, omitted.)

2. The tax upon the use of all tangible personal property other than that enumerated in subsection one hereof, which is sold by a retailer maintaining a place of business in this state, or by such other retailer as the tax commission shall authorize pursuant to section nine, (Code Sec. 6943.110) shall be collected by such retailer and remitted to the state tax commission, pursuant to the provisions of sections eight to twelve inclusive. (Code Secs. 6943.109 to 6943.113 inclusive.)

3. The tax upon the use of all tangible personal property not paid pursuant to subsections one and two hereof shall be paid to the commission directly by any person using such property within this state, pursuant to the provisions of section thirteen hereof. (Code Sec. 6943.114.)

(Secs. 6 and 7, omitted.)

Sec. 8. (Code Sec. 6943.109.) Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, not exempted under the provisions of section three hereof nor collectible under the provisions of section six hereof, shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the commission, if the commission shall, by regulation, require such receipt. Each such retailer shall list with the commission the name and

address of all his agents operating in this state, and the location of any and all his distribution or sales houses or offices or other places of business in this state.

(Sec. 9, omitted.)

(Sec. 10, omitted.)

Sec. 11. (Code Sec. 6943.112.) The tax herein required to be collected by any retailer pursuant to sections eight (Code Sec. 6943.109) or nine (Code Sec. 6943.110) hereof, and any tax collected by any retailer pursuant to said sections, shall constitute a debt owed by the retailer to this state.

(Secs. 12, 13, 14, 15, 16, 17, 18, 19 and 20, omitted.)

Sec. 21. (Code Sec. 6943.122.) Whenever any retailer maintaining a place of business in this state, or authorized to collect the tax herein imposed pursuant to section nine (Code Sec. 6943.110) hereof, fails to comply with any of the provisions of this act or any orders, rules, or regulations of the commission prescribed and adopted under this act, the commission may, upon notice and hearing as hereinafter provided, by order revoke the permit, if any, issued to such retailer under section eleven (11) of Senate File 316, acts of the Forty-seventh General Assembly (Code Sec. 6943.084), or if such retailer is a corporation authorized to do business in this state under chapter three hundred eighty-six (386), code, 1939, may certify to the secretary of state a copy of an order finding that such retailer has failed to comply with certain specified provisions, orders, rules or regulations. The secretary of state shall, upon receipt of such certified copy, revoke the permit authorizing said corporation to do business in this state, and shall issue a new permit only when such corporation shall have obtained from

the commission an order finding that such corporation has complied with its obligations under this act. No order authorized in this section shall be made until the retailer is given an opportunity to be heard and to show cause why such order should not be made, and he shall be given ten days' notice of the time, place, and purpose of such hearing. The commission shall have the power in its discretion to issue a new permit pursuant to section eleven of Senate File 316, acts of the Forty-seventh General Assembly (Code Sec. 6943.084), after such revocation.

(Secs. 22, 23, 24, and 25, omitted.)

Sec. 26. (Code Sec. 6943.125.) If any article of tangible personal property has already been subjected to a tax by any other state in respect to its sale or use in an amount less than the tax imposed by this title, the provisions of this title shall apply, but at a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax upon the sale or use was computed. If such tax imposed in such other state is two per cent (2%) or more, then no tax shall be due on such articles.

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Supreme Court of the United States

OCTOBER TERM, 1943

No. 441

GENERAL TRADING COMPANY, a corporation doing business as MINNEAPOLIS IRON STORE,

Petitioner,

vs.

STATE TAX COMMISSION OF THE STATE OF IOWA,

Respondent.

PETITIONER'S BRIEF.

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Supreme Court of the United States

OCTOBER TERM, 1943

No. 441

GENERAL TRADING COMPANY, a corporation doing business as MINNEAPOLIS IRON STORE.

Petitioner,

vs.

STATE TAX COMMISSION OF THE STATE OF IOWA,

Respondent.

PETITIONER'S BRIEF.

I.

The decision of the Supreme Court of Iowa is reported in *State Tax Commission of Iowa vs. General Trading Company*, ... Iowa, ..., 10 N. W. (2) 659 (July 27, 1943). It has not appeared in the official Iowa reports.

II.

The jurisdiction of this court is invoked under the order of this court dated November 22, 1943, granting certiorari, (R. 27) under Section 237(b), as amended, of the Judicial Code. Presumably the writ was granted because the decision below was in conflict with a decision of the Supreme Court of Michigan in *Simpson vs. Gundry*, 297 Mich. 403, 298 N. W. 81, certiorari denied *sub. nom. Brown vs. Simpson*, 314 U. S. 674, and with a decision of the Supreme Court of Arkansas in *McLeod vs. J. E. Dillworth Co.*, 171 S. W. (2nd) 62 (not yet officially reported), certiorari granted October 25, 1943, No. 311.

III.

STATEMENT OF FACTS.

The question presented is the validity of the use tax law of Iowa as applied to the particular sales here. The Iowa use tax law imposes a tax on the use of personal property purchased for the use in Iowa, and provides that such tax shall be collected when sold by a "retailer maintaining a place of business in this State," and makes *the retailer personally liable therefor.* (Sec. 11, 6943.122.)

The Supreme Court of Iowa held that the law in terms applied to petitioner because it was a "retailer maintaining a place of business in this State" within the statutory definition contained in the use tax law because it sent traveling salesmen into the state who were there only "temporarily".[1] That question is, of course, not open here, since

[1]For this statutory definition see paragraph 6, Section 1, of the Law (6943.102 Code).

that is purely a State question but that construction we assert renders the act unconstitutional.

This is the same tax law that was involved in *Nelson vs. Sears, Roebuck & Company*, 312 U. S. 359, and *Nelson vs. Montgomery Ward & Company*, 312 U. S. 373. The law itself is to be found in Sections 6943.102-6943.125 of the Iowa Code of 1939. It is reproduced in the appendix to this brief.

In the Sears, Roebuck Case supra (361), this Court summarized the terms of this law as follows:

> "The Iowa Use Tax is complementary to the Iowa Retail Sales Tax. Ia. Code 1939, sec. 6943.074, et seq. It is a tax on the use in Iowa of tangible personal property at the rate of two per cent of the purchase price. 'Use,' so far as material here, is defined as 'the exercise by any person of any right or power over tangible personal property incident to the ownership of that property.' Sec. 6943.102. While the tax is imposed on 'every person using such property within this state until such tax has been paid' (sec. 6943.103), it is further provided (sec. 6943.109) that every 'retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state . . . shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser . . .' By sec. 6943.112 the tax constitutes a 'debt owed by the retailer' to the state. And if the retailer fails to collect the tax, etc., his retailer's permit (sec. 6943.084) may be revoked; and in case of a foreign corporation, its permit to do business in the state as well. Sec. 6943.122"

It is only necessary to add that this use tax law applies only to *sales made without the state*. While the law in terms applies to all sales "whether within or without the

state," (sec. 8, 6943.109) yet sales *within* the state are subject to the sales tax (Code 6943.075, Sec. 2) and all sales subject to the sales tax are excluded from the operation of the use tax. (Code 6943.104, Sec. 3 (1)).

Petitioner is a Minnesota corporation, with principal place of business at Minneapolis, Minnesota. It is not admitted to do business in Iowa, and it has no office, agent, or place of business and does no business in that State.[2]

Its business is largely dealing in wholesale iron and steel and automobile accessories, which it sells, among others, to retailers in Iowa. Such sales and the properties covered are concededly not within the Iowa use tax. It occasionally sold its products to persons living in Iowa who were not retailers, but bought them for their own use, and the Iowa Supreme Court held petitioner liable for the use tax upon the products so sold. No question is raised as to the amount of the tax, if petitioner is liable for any of it.

Petitioner sent its traveling solicitors or drummers into Iowa. None of them either lived in Iowa or had quarters there. There they obtained the tentative orders which they were without authority to accept, and did not accept. These orders were transmitted to the head office in Minneapolis, Minnesota, and if the customer's credit was acceptable, the order was accepted at Minneapolis, and the goods shipped either by railway, bus, or parcel post, at the expense of the customer (R. 5-6).

The Iowa Tax Commission assessed petitioner for this use tax, which it refused to pay. Suit was brought to collect

[2]The Supreme Court of Iowa, held that petitioner was not doing business in Iowa, in the ordinary sense, apart from the statutory definition. (R. 20).

The Court said:

> "The answer asserts facts from which it appears that, if the phrase were to be given its ordinary meaning, defendant is not such a retailer, but we are dealing with a statutory definition."

the tax (R. 1-5). For the purpose of determining an important Federal question petitioner appeared voluntarily and set up in detail exactly how these sales were made (R. 5-8).

The Tax Commission demurred to petitioner's answer (R. 8), and the District Court sustained the demurrer (R. 9-12). Petitioner refused to plead further and judgment was entered against it (R. 12). Petitioner appealed to the Supreme Court of Iowa (R. 13), where the judgment was affirmed (R. 17-26).

In its answer, to which the demurrer was sustained, petitioner specifically set up and claimed that the imposition of this tax violated both the due process clause of the Fourteenth Amendment and the commerce clause (R. 6-7).

These contentions were renewed in the Iowa Supreme Court (R. 14-16), where they were rejected (R. 17-26). This court granted certiorari (R. 27).

IV.

ASSIGNMENTS OF ERROR.

The Court below, the Supreme Court of Iowa, erred:

(1) In holding that the use tax law of Iowa, as applied to the facts here, did not violate the due process clause of the Fourteenth Amendment to the United States Constitution.

(2) In holding that the use tax law of the State of Iowa, as applied to the facts here, did not violate the commerce clause of the United States Constitution, to-wit: Article I, Section 8, Clause 3.

V.

SUMMARY OF ARGUMENT.

While the law designates this tax as a use tax, yet since the only thing which petitioner did was to sell the property and not use it, so far as petitioner is concerned it was in effect a sales tax. Since it applies only to sales made outside the state, and all such sales were in fact made outside of Iowa and petitioner was not doing business in Iowa, this use tax law as applied to petitioner and the imposition of a tax thereunder violates the due process clause of the Fourteenth Amendment. Since the only thing petitioner did in Iowa was to send solicitors into the state, which is a part of interstate commerce, such law as applied to petitioner violates the commerce clause.

VI.

ARGUMENT.

(All Italics Supplied)

A. Nature of the Tax.

The argument of the state seems to be this: That the tax here involved is a use tax levied on the use of property within the state of Iowa, and that the imposition of that tax is not prohibited by the due process clause because the "taxable event", i. e., the use, occurs within the jurisdiction of Iowa and, since the interstate transportation is over before the use can begin, the levy of such a tax does not violate the commerce clause (*Henneford vs. Silas Mason Co.*, 300 U. S. 577).

This argument is unanswerable as to anyone who actually uses the property within the territorial jurisdiction of Iowa.

But here the law requires that this petitioner, who is not in Iowa and who only makes sales outside of Iowa, pay a tax on the use that someone else makes of the article within the state.

True, petitioner is supposed to reimburse itself by collecting the amount of the tax from its customers, but petitioner is liable for the tax whether collected or not. The judgment in this case compells petitioner to pay it. It is not apparent how an invalid tax can be converted into a valid one merely because the seller can avoid an actual out-of-pocket loss.

The law imposes a tax on "the purchase price of such property" (6943.103). True, it is designated a use tax but, petitioner did not use the property and, if it had been designated a sales tax, the effect on petitioner would have been the same. All that petitioner did was to sell the property outside the state of Iowa for use in Iowa, and it is taxed because it did so. Therefore, it is just as much a sales tax so far as petitioner is concerned as though it were expressly designated such.

It is not important what label the state legislature or the state court puts upon a tax. It is its natural and reasonable effect which governs. This is Hornbook law. But see—

Macallen vs. Mass., 279 U. S. 620 (625) and cases cited.

Wisconsin vs. J. C. Penney Co., 311 U. S. 435 (443) and cases cited.

Educational Films Co. vs. Ward, 282 U. S. 379.

Nelson vs. Sears, Roebuck & Co., supra (363).

B. None of the Recent Decisions of this Court Can Be Construed as Sustaining this Use Tax Law.

The Supreme Court of Iowa deemed that this case was controlled by *Nelson vs. Sears, Roebuck & Company*, 312 U. S. 359, and *Nelson vs. Montgomery Ward & Company*, 312 U. S. 373.

Nobody now disputes the right of the State to tax the user within the State on the use of property even though that property comes from another State. *Henneford vs. Silas Mason Company*, supra.

The right of a State to require a foreign corporation, *actually doing business within such State* (whether formally licensed to do business or not), to act as a collecting agent of the State for the purposes of the use tax is no longer open to question since the *Sears, Roebuck case*. This seems to be true whether or not the particular sales are brought about by the business done within the State. *Monamotor Oil Company vs. Johnson*, 292 U. S. 86; *Nelson vs. Sears, Roebuck & Company*, supra; *Nelson vs. Montgomery Ward & Company*, supra. *Felt & Tarrant Mfg. Co. vs. Gallagher*, 306 U. S. 62. In all these cases the corporation was *actually doing business in the state*.

In the *Felt & Tarrant Manufacturing Company* case (supra), upon which the state laid such emphasis in its brief opposing certiorari, that corporation was doing business in the state although not licensed so to do. It had to be doing business for the law to apply. While the California law applied to a "retailer maintaining a place of business in the state" as does the Iowa law, there was no definition of the term in the law, which would include mere soliciting. On the contrary rule six of the Board, defined

"Place of business" as "*an office or other premises regularly used by the retailer for the transaction of business.*" See *Felt & Tarrant Manufacturing Co. vs. Corbett*, 23 Fed. Supp. 186 (191), (the decision below), where the three judge Court held:

> "The allegations of the bill . . . . fully warrant the conclusion that plaintiff's method of doing business includes maintaining *at least two places of business in California.*"

See the discussion of the case by Mr. Justice Roberts in his dissenting opinion in the *Sears, Roebuck* case supra (370).

But here we have a situation where (1) solicitors were sent into Iowa who solicited an order for the sales, but did not make them; (2) the orders were accepted and sales were actually made outside the State and the property delivered to the purchaser outside the State by delivery to a common carrier; (3) petitioner was not doing business in Iowa, and was not licensed so to do.

It is clear that the Iowa Supreme Court misinterpreted the *Sears, Roebuck* and *Montgomery Ward* cases. The real reason for these decisions was this:

The defendants were foreign corporations admitted to do business in the State of Iowa, and maintained in Iowa retail stores. As a price to be paid for the privilege of doing business in Iowa, the burden of collecting the use tax could be imposed. Note the language of the Court in the *Sears, Roebuck* case as follows:

> "Since Iowa has extended to it that privilege (doing business in the state), Iowa can exact this burden (i. e., compel it to act as the collecting agent of the state) as a price of enjoying the full benefits flowing from its Iowa business." (364)

The same rule applies where the corporation is *actually doing business* without being formally licensed. *Monamotor Oil Company vs. Johnson*, supra. *Felt and Tarrant Mfg. Co. vs. Gallagher*, supra. But where, as here, a corporation is neither licensed to do business in a State nor, in fact, doing any business therein except the solicitation of orders in interstate commerce, the State cannot levy such a tax due to "impotence of state power." It may be claimed as the Iowa Supreme Court intimated (R. 22), that this Court used the term "impotence" as meaning impotence of State power to collect the tax, and not impotence to levy the tax, but a further reading of the opinion clearly discloses that this Court did not use the words "impotence of state power" in that sense. This Court said:

> "It points to the fact that in its mail order business it is in competition with out-of-state mail order houses *which need not and do not collect the tax on their Iowa sales.* But those other concerns *are not doing business in the state as foreign corporations. Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price*" (365).

The cases of *Wisconsin vs. J. C. Penny Company*, 311 U. S. 435, and *State Tax Commission of Utah vs. Aldrich*, 316 U. S. 174, while differing somewhat on the facts, were decided on this same theory.

In the *J. C. Penny Case* this court said:

> "The simple but controlling question is whether the state has given anything for which it can ask return. *The substantial privilege of carrying on business in Wisconsin*, which has here been given, *clearly supports the tax*, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders." (443)

In the *Utah Tax Commission* case, the court said:

> "Suffice it to say that if that freedom of transfer exists as respondents claim, it stems from Utah law. It finds its ultimate source in the authority which Utah has granted. *It is indeed a benefit which Utah has bestowed. For it alone Utah may constitutionally ask a return.*" (180)

As we read the *Sears, Roebuck* and the *Montgomery Ward* decisions, this Court in no way disapproved of the propositions of law laid down in Mr. Justice Roberts' dissenting opinion. This Court merely held those propositions were inapplicable to the case for the sole reason that there the foreign corporations had been licensed to transact business in Iowa, and were in fact transacting business, and, hence, were liable for the tax.

If this is not what the *Sears, Roebuck* and *Montgomery Ward* decisions mean, then they must mean that anyone in the United States from Maine to California (even though he has never been in, or had any representative within the State of Iowa), who sends by mail or otherwise into Iowa any tangible property which the purchaser intends to use therein, must collect and pay to the State of Iowa a use tax thereon, or at least that a valid law could be enacted that would require this.

We do not believe that this Court intended to commit itself to any such doctrine because it would appear axiomatic that in order that petitioner be subject to a tax in Iowa there must have occurred in that State some "taxable event" on the part of petitioner. The only things done by petitioner that could possibly be claimed to in any way connect it with Iowa are the following:

a. That after having made a contract for the sale of the property in Minnesota, it performed that contract there, by delivery in Minnesota to common carriers, which in turn transported the property to destination in Iowa.

b. Prior to the making of the contracts of sale in Minnesota it had sent into Iowa traveling salesmen who did not live in such State and had no quarters there and who merely passed into the State and out again. These traveling salesmen took tentative orders which they were without authority to and did not accept.

We hope to demonstrate that neither of these activities constituted a "taxable event" in Iowa.

The difference between the situation in the *Sears, Roebuck* and *Montgomery Ward* cases and the situation here is that there the State had extended a privilege and therefore had the right to impose conditions; here the State had extended no privilege because the right to solicit interstate business was a privilege conferred by the Federal Constitution.

C. This Tax Violates the Due Process Clause of the Fourteenth Amendment Since the Sale of the Property Was Not a "Taxable Event" in Iowa.

While the Iowa use tax law in terms applies to all sales "whether within or without the state," yet the words "within . . . . the state" are effectively eliminated because if the sales are made within the state they are subject to the sales tax and not the use tax. Unless a foreign corporation is licensed to do business in a state (or is actually doing business there without a license), a state cannot tax any of its transactions or property beyond the state. Such a tax violates the due process clause.

Frick vs. Pennsylvania, 268 U. S. 473.
Surplus Trading Co. vs. Cook, 281 U. S. 647.
James vs. Dravo Contracting Co., 302 U. S. 139.
Hans Rees Sons vs. North Carolina, 283 U. S. 123.
Connecticut General Life Insurance Company vs. Johnson, 303 U. S. 77.
Rhode Island Hospital Trust Company vs. Doughton, 270 U. S. 69.

The converse apparently deducible from the *Sears, Roebuck, Montgomery Ward* and *J. C. Penny Co.* cases is that where a foreign corporation is *licensed by the State to transact business therein or is actually transacting business*, the State may, as a condition to permitting it to so transact business, even require the corporation to pay taxes on transactions beyond the State's jurisdiction. This rule undoubtedly has its limitations, which it is not necessary to determine here:

The fact that petitioner sent solicitors into the State without authority to consummate contracts, but merely to solicit tentative orders does not constitute doing business within the State.

Green vs. C. B. & Q. Ry. Co., 205 U. S. 530.
People's Tobacco Company vs. American Tobacco Company, 246 U. S. 79 (87).
Philadelphia & Reading Railway Company vs. McKibbin, 243 U. S. 264 (268).

Unless the sales here were actually made outside of Iowa, the use tax by its terms does not apply. But, aside from this, there is no question but that these sales were consum-

mated in Minnesota, where the orders were accepted and where delivery was made to a common carrier.

United States vs. Andrews & Co., 207 U. S. 229.

D. L. & W. Ry. Co. vs. United States, 231 U. S. 363 (371).

Certainly this does not constitute a "taxable event" in Iowa and, since petitioner was not transacting business in Iowa, this tax violates the due process clause.

D. The Tax Violates the Commerce Clause, Since Sending Solicitors Into Iowa Is Not a "Taxable Event" in Iowa.

The validity of this tax cannot rest upon the fact that these articles were transported by a common carrier into Iowa.

Aside from the fact that all of petitioner's activities were outside of Iowa, and that it did not transport these articles at all, the transportation of these goods in interstate commerce by any one, was the enjoyment of an activity granted by the Federal Constitution and in no way dependent upon Iowa law.

> To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States.
>
> *International Text Book vs. Pigg*, 217 U. S. 91 (109).

Gibbons vs. Ogden, 9 Wheat 1; *Alpha Portland Cement Co. vs. Massachusetts*, 268 U. S. 203. It, hence, cannot be the basis of a tax by Iowa.

> "A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." *Murdock vs. Pennsylvania*, 319 U. S. 105 (113).

See also *Ozark Pipe Line vs. Monier*, 266 U. S. 555; *Heyman vs. Hayes*, 236 U. S. 178.

The case is far different from *McGoldrick vs. Berwind-White Coal Mining Company*, 309 U. S. 33, where the Coal Company was doing business in the State and *made the deliveries in New York itself*, and that delivery was what was taxed.

After all is said and done, if the Iowa law is to be sustained in this case it must be on the theory that solicitors of petitioner entered the State of Iowa and solicited these sales before any sale was in fact made.

In other words, this Court must, as the Iowa Court did, extend the doctrine of the *Sears, Roebuck* and *Montgomery Ward cases*, which are applicable only to a corporation actually doing business in the State, to a foreign corporation which does no business therein and only sends solicitors into the State for the solicitation of interstate orders. It is submitted on both reason and authority that this should not be done and that as construed by the highest court of Iowa, the act violates the commerce clause.

Solicitation of the sale of goods for an interstate commerce sale is a part of interstate commerce. Such solicitation of goods for an interstate commerce sale cannot be taxed by the State under any guise whatsoever. *Robbins vs. Shelby County Taxing District*, 120 U. S. 489. There this Court denounced a license or privilege tax on traveling salesmen or drummers who solicited sales in interstate commerce and who did not have a regular licensed house of

business within the taxing district. The rule laid down in the *Robbins* case has been reiterated not less than twenty times. *Corson vs. Maryland*, 120 U. S. 502; *Asher vs. Texas*, 128 U. S. 129; *Leloup vs. Port of Mobile*, 127 U. S. 640; *Stouttenburgh vs. Hennick*, 129 U. S. 141; *McCall vs. California*, 136 U. S. 194; *Crutcher vs. Kentucky*, 141 U. S. 47; *Brennan vs. Titusville*, 153 U. S. 289; *Stockard vs. Morgan*, 185 U. S. 27; *Caldwell vs. North Carolina*, 187 U. S. 622; *Crenshaw vs. Arkansas*, 227 U. S. 389; *Rogers vs. Arkansas*, 227 U. S. 401; *Rearick vs. Pennsylvania*, 203 U. S. 507; *Dozier vs. Alabama*, 218 U. S. 124; *Stewart vs. Michigan*, 232 U. S. 665; *Davis vs. Virginia*, 236 U. S. 697; *Browning vs. Waycross*, 233 U. S. 16; *Real Silk Hosiery Mills vs. Portland*, 268 U. S. 325; *Texas Transport & Terminal Co. vs. New Orleans*, 264 U. S. 150; *Crew Levick Co. vs. Pennsylvania*, 245 U. S. 292; *Western Oil Refining Co. vs. Lipscomb*, 244 U. S. 346.

This Court went farther and held in the *Robbins* case:

> "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." (497)

Nor was this rule that interstate commerce cannot be taxed at all, notwithstanding that the same amount of tax was laid on intrastate commerce ever questioned in any of these cases. This rule was first laid down in *Case of State Freight Tax*, 15 Wall. 232 (277); was reiterated in the *Robbins* case, supra; in *Crew Levick Company vs. Pennsylvania*, supra (297); was recognized in *Cooney vs. Mountain States Telephone & Telegraph Company*, 294 U. S. 384, and was expressly again reiterated in *Adams Manufacturing Company vs. Storen*, 304 U. S. 307 (312), where this Court said:

> "The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce."

The rule was adverted to in the *Berwin-White Coal Mining Company* case, supra (57), and in *Murdock vs. Pennsylvania*, 319 U. S. 105 (113), where this Court said:

> "Thus, it may not exact a license tax for the privilege of carrying on interstate commerce (*McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 56-58), although it may tax the property used in, or the income derived from that commerce, so long as those taxes are not discriminatory." Id., p. 47 and cases cited.

There has been only one discordant note, i. e., certain *obiter dicta* in the *Berwind-White Coal Mining Company* case, supra, to-wit:

(a) The suggestion of the Court on page 56 where it is stated that the statutes in the *Robbins* case and the cases following it were

> "capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state."

An examination of these cases above cited shows that with the exception of the cases specifically to be mentioned, all of the statutes or ordinances involved, applied equally to intrastate as well as interstate commerce and this court held them invalid as to interstate transactions. As to whether these statutes discriminated in favor of retail stores cannot be determined from the statement of facts in the opinions

since this court was not interested in that phase. It is quite likely that in each case retail stores were subject to another form of taxation and that the imposition of the tax on solicitors was merely to equalize the burden of taxation rather than to discriminate. (Compare *Caskey Baking Inc. vs. Virginia*, 313 U. S. 117 (120). But even though it is possible to find any discrimination in favor of retail stores, that discrimination would be against both interstate and intrastate solicitors, and hence the statute could be invalidated only under the equal protection clause, and in no sense could be held a discrimination against interstate commerce.

In *Davis vs. Virginia*, supra, the opinion does not make clear whether the law applied to both interstate and intrastate commerce but presumably it applied to both.

In the *Robbins* case supra the law applied to drummers who did not have a licensed house of business within the taxing district. But by its terms the law applied to all Tennessee drummers (intrastate commerce) as well as those from outside of Tennessee (interstate commerce) and hence there was no discrimination against commerce among the states. Any discrimination in favor of retail stores was therefore a discrimination against all solicitors and not merely those in interstate commerce. The court having disposed of the case on another ground then pointed out (498) that "it would not be difficult" to show discrimination which, if it existed, merely emphasized a violation of the commerce clause. The same is true of *Caldwell vs. North Carolina*, supra (632).

In the *Dozier* case, supra, the law applied to all solicitors "not having an established place of business within the state." It applied as well to Alabama drummers as to for-

eign drummers provided they had no established place of business. Again if there was a discrimination in favor of retail stores it was a discrimination against all drummers and not those engaged in interstate commerce.

But the *Robbins* and every one of the cases following it was decided on the theory that interstate commerce could not be taxed at all and not on the theory of discrimination.

Any advantage in favor of retail stores was therefore, in the category mentioned in *Armour and Co. vs. Virginia*, 246 U. S. 1 (7) where the court said:

> "It follows therefore that, if the asserted disadvantage be real and not imaginary, it would be one not direct *because not arising from the operation and effect of the statute*, but indirect as a mere consequence of the situation of the persons and property affected and of the non-discriminating exercise by the State of power which it had a right to exert without violating the Constitution. . . ."

(b) The suggestion on pages 56 and 57 of the *Berwind-White Coal Mining Company* case, supra, that the doctrine of the *Robbins* case, and the cases following it

> "has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders."

This, again, was strictly obiter, since the tax there was sustained on the theory that the coal was delivered within the State.

However, if the Court intended to emphasize the words "*fixed-sum license taxes*," we think the Court must have spoken inadvertently, since, in the same opinion, it said (57):

> "It is true that a state tax upon the operations of interstate commerce measured either by its volume or the gross receipts derived from it has been held to infringe the commerce clause * * *."

In *Murdock vs. Pennsylvania*, supra, this Court said:

> "It is true that the First Amendment, like the commerce clause, draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes."

The taxes denounced in *Cheney Brothers Company vs. Massachusetts*, 246 U. S. 147; *Crew Levick Company vs. Pennsylvania*, supra; *Adams Manufacturing Company vs. Storen*, supra; *Fisher's Blend Station vs. State Tax Commission*, 297 U. S. 650, and *Puget Sound Stevedoring Company vs. State Tax Commission*, 302 U. S. 90, were not "fixed-sum license taxes." On principle, what distinction can be made between a fixed-sum license tax and a tax based on the amount of sales. None is apparent. See *Lyng vs. Michigan*, 135 U. S. 161, where the Court said (166):

> "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

In view of the cases which the Court cites (*Machine Company vs. Gage*, 100 U. S. 676, and *Wagner vs. Covington*, 251 U. S. 95), it seems clear that the words which the Court intended to emphasize were "*imposed on the business of soliciting orders.*" Those cases merely laid down the rule

that there was a distinction between imposing a tax on a peddler who sold goods which had already been imported into the State, and imposing a tax on the solicitation of orders for goods thereafter to be brought into the State. This, of course, had always been the law. To the cases enunciating the so-called "peddler rule" could be added *Emert vs. Missouri*, 156 U. S. 296, and *Caskey Baking Company vs. Virginia*, 313 U. S. 117 (119).

This distinction between the soliciting and peddling was recognized in the *Robbins* case, supra (497), quoted with approval in *Wagner vs. Covington*, supra (103):

> "The distinction between state regulation of peddlers and the attempt to impose like regulations upon drummers who solicit sales of goods that are to be thereafter transported in interstate commerce, has always been recognized. In *Robbins v. Shelby County Taxing District*, 120 U. S. 489, Mr. Justice Bradley, who spoke for the court, said (p. 497): 'When goods are sent from one State to another for sale, or, in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them as goods from another State, and that they be not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are. *Brown v. Houston*, 114 U. S. 622; *Machine Co. v. Gage*, 100 U. S. 676. But to tax the sale of such goods, or the offer to sell them, *before they are brought into the State*, is a very different thing, and seems to us clearly a tax on interstate commerce.'"

As to peddlers who carry the articles with them, there must be a discrimination against interstate commerce to render the taxing law invalid (*Welton vs. Missouri*, 91 U. S. 275; *Walling vs. Michigan*, 116 U. S. 446), but any tax which rests

for its basis, upon the act of soliciting orders for interstate commerce is a burden on such commerce, whether discriminatory or not.

In the *Berwind-White Coal Mining Company* case, this Court adopted the theory of the peddler cases, because the coal had already completed its interstate trip, and it was the "delivery of goods within the State" which was taxed (58).

While, of course, under Section 26 of the Iowa law (6943.125), if a sales tax were levied in Minnesota on the sale of this property (Minnesota now has no sales tax), it would reduce the Iowa use tax *pro tanto;* yet if Iowa can levy a tax because solicitors enter the State, notwithstanding the commerce clause, imagine what could occur in case of a sale in Washington, shipped by common carrier to Iowa, passing through Idaho, Montana, North Dakota and Minnesota on the way. If Iowa is not restrained from taxing the use of this property as against the petitioner by the commerce clause, then neither is Idaho nor Montana nor North Dakota nor Minnesota restrained from levying a tax on the transportation, nor is Washington restrained from levying a tax on the seller for sending its salesmen into Iowa and there taking orders. All of this would break down the century old holding that interstate commerce can be regulated only by the National Government and permit the States to burden interstate commerce by unrestricted taxation. It illustrates the wisdom of this Court in its previous decisions in not permitting interstate commerce to be taxed at all.

The claim that this Court should meet the situation of multiple taxation by various states as and when it arises, if adopted, will mean that the validity and enforceability of

the Iowa law rests on whether some other State with power to tax chooses to exercise that power. This theory runs entirely counter to what this Court has held in numerous cases, including *Gwin, White & Prince, Inc., vs. Henneford*, 305 U. S. 434, and *Western Live Stock vs. Bureau of Revenue*, 303 U. S. 250 (256).

The theory that the validity of a State tax is to be determined by whether some other State has exercised its power of taxation has been definitely repudiated by this Court.

Curry vs. McCanless, 307 U. S. 357 (368).

State Tax Commission vs. Aldrich, 316 U. S. 174.

To hold that this tax can be sustained as to interstate commerce, because substantially the same tax (sales tax) is levied upon intrastate commerce, is to overrule a very long series of cases decided by this Court. Many of these have been cited. While it is recognized that there may be some difference between a taxing statute and one of regulation (*Sonneborn Bros. vs. Curton*, 262 U. S. 506), it might with equal propriety be claimed that a State may regulate interstate rates, because it likewise fixes intrastate rates at the same level.

This would be to invoke the "equal protection" clause, of the Fourteenth Amendment, as the standard by which regulation or taxation of interstate commerce is to be judged, rather than the commerce clause.

E. CONCLUSION.

Counsel became righteously indignant in the brief opposing certiorari about the injustice that would result to retail stores in Iowa unless this tax were sustained. This is hardly an argument which should appeal to an appellate court but, however that may be, such argument is conclusively answered by this court's opinion in *Robbins vs. Shelby County Taxing District,* supra, where this court said (499):

> "To say that the tax, if invalid as against drummers from other states, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument; because, the state is not bound to tax its own drummers; and if it does so whilst having no power to tax those of other states, it acts of its own free will, and is itself the author of such discrimination. As before said, the state may tax its own internal commerce; but that does not give it any right to tax interstate commerce."

This, however, is not very important, since under Sections 2 and 5 (3) (6943.103, 6943.114), the State can collect this tax from the user of the property. Hence, in no event does the purchaser pay any less by buying out of the state.

After all is said and done, taxation is, as this Court has repeatedly observed, a practical subject, to be approached from the angle of the realities rather than the niceties of legal theory. Examined in that light, this case is one where a citizen of one State is proposed to be taxed by another State to which he is an utter stranger. Petitioner does not reside, has no place of business, and does no business in Iowa, and has not sought the protection of the Iowa laws. If this tax is to be sustained, it would have to be

because of fortuitous circumstance that some of its customers reside in that State and presumably intend to use therein the property bought by them. While it may be conceded that under the Montgomery Ward and Sears, Roebuck cases a State is empowered to constitute its own citizens and those who have submitted themselves to its jurisdiction by doing business therein as involuntary agents for the collection of the tax, certainly the line must be drawn before the State can do this to sheer outsiders. In these days of bewildering taxation, a citizen, be he individual or corporate, has enough on his hands to keep his peace with his own taxing authorities and the National Government. To force him to conform to the taxing laws of other States which he has not entered, and to which he is a stranger, is to impose what is not only an intolerable burden, but likewise an unconstitutional one.

The judgment of the Supreme Court of Iowa should be reversed and the use tax of Iowa held to violate both the due process clause and the commerce clauses.

Respectfully submitted,

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APPENDIX.

(Personal Property Use Tax Act)

Section 1. (Sec. 6943.102 Code 1939.) The following words, terms and phrases when used in this act shall have the meanings ascribed to them in this section:

1. "Use" means and includes the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include processing, or the sale of that property in the regular course of business. Property used in "processing" within the meaning of this subsection shall mean and include (1) any tangible personal property including containers which it is intended shall, by means of fabrication, compounding, manufacturing, or germination, become an integral part of other tangible personal property intended to be sold ultimately at retail, (2) fuel which is consumed in creating power, heat or steam for processing or for generating electric current, (3) industrial materials and equipment, which are not readily obtainable in Iowa, and which are directly used in the actual fabricating, compounding, manufacturing or servicing of tangible personal property intended to be sold ultimately at retail.

(Paragraphs 2, 3, and 4, Sec. 1, omitted.)

5. "Retailer" means and includes every person engaged in the business of selling tangible personal property for use within the meaning of this act; provided, however, that when in the opinion of the commission it is necessary for the efficient administration of this act to regard any salesmen, representatives, truckers, peddlers or canvassers, as the agent of the dealers, distributors, supervisors, em-

ployers or persons under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers, or persons, the commission may so regard them and may regard the dealers, distributors, supervisors, employers, or persons as retailers for purposes of this act.

6. "Retailer maintaining a place of business in this state" or any like term, shall mean and include any retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent operating within this state under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent is located here permanently or temporarily, or whether such retailer or subsidiary is admitted to do business within this state pursuant to chapter three hundred eighty-six (386), code, 1939.

(Paragraphs 7, 8, 9, Section 1, omitted.)

Sec. 2. (Code Sec. 6943.103.) An excise tax is hereby imposed on the use in this state of tangible personal property purchased on or after the effective date of this act (April 16, 1937) for use in this state, at the rate of two per cent of the purchase price of such property. Said tax is hereby imposed upon every person using such property within this state until such tax has been paid directly to the county treasurer, to a retailer, or to the commission as hereinafter provided.

Sec. 3. (Code Sec. 6943.104) The use in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

1. Tangible personal property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Senate File 316, acts of the Forty-seventh General Assembly, (Code, Chap. 329.3, Div. IV, The Sales Tax Act) and any amendments made or which may hereafter be made thereto. This exemption does not include new motor vehicles as defined herein.

(Sec. 4, omitted.)

Sec. 5. (Code Sec. 6943.106.) The tax herein imposed shall be collected in the following manner:

(Par. 1, Sec. 5, omitted.)

2. The tax upon the use of all tangible personal property other than that enumerated in subsection one hereof, which is sold by a retailer maintaining a place of business in this state, or by such other retailer as the tax commission shall authorize pursuant to section nine, (Code Sec. 6943.110) shall be collected by such retailer and remitted to the state tax commission, pursuant to the provisions of sections eight to twelve inclusive. (Code Secs. 6943.109 to 6943.113 inclusive.)

3. The tax upon the use of all tangible personal property not paid pursuant to subsections one and two hereof shall be paid to the commission directly by any person using such property within this state, pursuant to the provisions of section thirteen hereof. (Code Sec. 6943.114.)

(Secs. 6 and 7, omitted.)

Sec. 8. (Code Sec. 6943.109.) Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, not exempted under the provisions of section three hereof nor collectible under the provisions of section six hereof, shall at the time of making such sales, whether within or without

the state, collect the tax imposed by this act from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the commission, if the commission shall, by regulation, require such receipt. Each such retailer shall list with the commission the name and address of all his agents operating in this state, and the location of any and all his distribution or sales houses or offices or other places of business in this state.

(Sec. 9, omitted.)

(Sec. 10, omitted.)

Sec. 11. (Code Sec. 6943.112.) The tax herein required to be collected by any retailer pursuant to sections eight (Code Sec. 6943.109) or nine (Code Sec. 6943.110) hereof, and any tax collected by any retailer pursuant to said sections, shall constitute a debt owed by the retailer to this state.

(Secs. 12, 13, 14, 15, 16, 17, 18, 19 and 20, omitted.)

Sec. 21. (Code Sec. 6943.122.) Whenever any retailer maintaining a place of business in this state, or authorized to collect the tax herein imposed pursuant to section nine (Code Sec. 6943.110) hereof, fails to comply with any of the provisions of this act or any orders, rules, or regulations of the commission prescribed and adopted under this act, the commission may, upon notice and hearing as hereinafter provided, by order revoke the permit, if any, issued to such retailer under section eleven (11) of Senate File 316, acts of the Forty-seventh General Assembly (Code Sec. 6943.084), or if such retailer is a corporation authorized to do business in this state under chapter three hundred eighty-six (386), code, 1939, may certify to the secretary of state a copy of an order finding that such retailer has failed to comply

with certain specified provisions, orders, rules or regulations. The secretary of state shall, upon receipt of such certified copy, revoke the permit authorizing said corporation to do business in this state, and shall issue a new permit only when such corporation shall have obtained from the commission an order finding that such corporation has complied with its obligations under this act. No order authorized in this section shall be made until the retailer is given an opportunity to be heard and to show cause why such order should not be made, and he shall be given ten days' notice of the time, place, and purpose of such hearing. The commission shall have the power in its discretion to issue a new permit pursuant to section eleven of Senate File 316, acts of the Forty-seventh General Assembly (Code Sec. 6943.084), after such revocation.

(Secs. 22, 23, 24, and 25, omitted.)

Sec. 26. (Code Sec. 6943.125.) If any article of tangible personal property has already been subjected to a tax by any other state in respect to its sale or use in an amount less than the tax imposed by this title, the provisions of this title shall apply, but at a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax upon the sale or use was computed. If such tax imposed in such other state is two per cent (2%) or more, then no tax shall be due on such articles.

(Retail Sales Tax Act)

Sec. 2. (Code Sec. 6943.075.) Tax Imposed. There is hereby imposed, beginning the first day of April, 1937, a

tax of two percent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this Act, sold at retail in the state to consumers or users * * *

The tax herein levied shall be computed and collected as hereinafter provided.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 441.

GENERAL TRADING COMPANY, a corporation, doing business as MINNEAPOLIS IRON STORE,
Petitioner,

vs.

STATE TAX COMMISSION OF THE STATE OF IOWA,
Respondent.

BRIEF IN BEHALF OF THE STATE TAX COMMISSION OF THE STATE OF IOWA, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN M. RANKIN, Attorney General of the State of Iowa,
JENS GROTHE, Special Assistant Attorney General of the State of Iowa,
Attorneys for State Tax Commission of the State of Iowa, Respondent.

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BRIEF IN BEHALF OF THE STATE TAX COMMISSION OF THE STATE OF IOWA, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The following allegations of plaintiff's petition were expressly admitted by defendant's answer:

"1. That the plaintiff is a branch of the government of the State of Iowa and is charged with the power and duty to collect the use tax due the State of Iowa under Chapter 329.4 of the 1939 Code of Iowa.

2. That the defendant General Trading Company is a corporation organized and existing under the laws of the State of Minnesota with its principal place of business in Saint Paul, Minnesota, and said defendant is engaged in the sale of certain merchandise through its branch under the trade name of Minneapolis Iron Store located in Minneapolis, Minnesota.

* * * * * * * *

5. Plaintiff states that defendant failed to file use tax returns for said period and failed to collect and pay to the State of Iowa the use tax due the State of Iowa for sales and deliveries of merchandise during said period under the provisions of Section 6943.113 of the 1939 Code of Iowa and thereafter on October 6, 1941, the plaintiff Commission, acting pursuant to the provisions of Section 6943.116 of the 1939 Code of Iowa, determined the amount due the State of Iowa for such sales and deliveries of merchandise during said period in the sum of $360.00 with penalty computed to October 6, 1941, in the sum of $102.96, or a total of $462.96 and there is attached hereto marked Exhibit 'A' and by reference made a part hereof a copy of said assessment. Notice of said assessment was given to the defendant by registered mail addressed to the defendant at its place of business in Minneapolis, Minnesota, a copy of which notice is attached hereto, marked Exhibit 'B' and by reference made a part hereof. The return receipt of the registered envelope containing the notice of assessment bears date October 7, 1941, and there is attached hereto marked Exhibit 'B-1' the return receipt of said registered envelope which is by reference made a part hereof.

6. Plaintiff states that no appeal was taken from said determination of tax and the time for appeal has expired."

The following well pleaded allegations of defendant's answer were admitted by plaintiff's demurrer thereto:

"That defendant is a corporation duly organized and existing under the laws of the State of Minnesota with its principal place of business in Saint Paul in that state; that it has never qualified to do business in the State of Iowa as a foreign corporation or otherwise under the Iowa statutes. That it has not maintained any office, distribution house, sales house or warehouse through which it has sold tangible personal property to persons in Iowa; that from time to time defendant sent from the State of Minnesota into the State of Iowa travelling salesmen, none of whom ever lived or had headquarters in the State of Iowa; that said travelling salesmen went into the State of Iowa and solicited orders for merchandise which were subject to acceptance or rejection by defendant at its

office in Minneapolis, Minnesota; that in filling such orders as were accepted by the defendant at its office in Minneapolis, Minnesota, goods and merchandise were shipped from the place of business of defendant in Minneapolis, Minnesota, by delivery to common carriers, either by truck or rail or by delivery to the United States Postal Department for transportation to such purchasers in the State of Iowa; that such purchasers paid all cost of such transportation by such common carriers or by parcel post."

Simultaneously with the filing of the answer, the Tax Commission filed a demurrer thereto which asserted:

1. The answer shows on its face that the defendant is a "retailer" and a "retailer maintaining a place of business in this state" as defined by paragraphs 5 and 6 of Section 6943.102, Code of 1939.

2. The answer shows on its face that defendant as a "retailer" and a "retailer maintaining a place of business in this state" made sales to Iowa purchasers and is liable for said use tax assessment under the provisions of the Iowa Use Tax Law.

The demurrer was sustained by the trial court and this decision was upheld by the Iowa Supreme Court (*State Tax Commission of the State of Iowa vs. General Trading Company, supra*).

That the following allegations of defendant's answer were purely argumentative and conclusions of law, and were therefore not admitted by the demurrer:

"That its right to engage in such business was not dependent on any law of or privilege extended by the State of Iowa and was not subject to regulation by the State of Iowa; that the right to engage in such business is a right conferred upon defendant by virtue of the Constitution and laws of the United States and by the laws of Minnesota; that as applied to the transactions of the defendant hereinbefore set forth, plaintiff and the State of Iowa were, and are, wholly without jurisdiction to make any assessment against or charge upon this defend-

ant for the privilege of carrying on such interstate business, and that if Chapter 329.4, Iowa Code of 1939, commonly known as the Iowa Use Tax Act, be construed to give the plaintiff power to make an assessment against the defendant, the said Act is void for the reason that said law violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and further violates the provisions of Section 8, Article I, of the Constitution of the United States, which vests in the Congress of the United States exclusive power to regulate commerce with foreign nations and among the several states; that if so construed, said statute would result in the taking of property of this defendant without due process of law, contrary to and in violation of the provisions of Section 9, Article I, of the Constitution of the State of Iowa."

ARGUMENT.

It is our contention that the petition for writ of certiorari herein should be denied for the reason that the case at bar is ruled by the following cases decided by this Court:

Bowman v. *Continental Oil Co., Supra.*
Monamotor Oil Co. v. *Johnson, Supra.*
Henneford v. *Silas Mason Co., Supra.*
Felt & Tarrant Mfg. Co. v. *Gallagher, Supra.*
Nelson v. *Sears Roebuck & Co., Supra.*
Nelson v. *Montgomery Ward & Co., Supra.*

Bowman v. *Continental Oil Co.* recognized the right of the state to require a distributor "to render detailed statements of all gasoline received, sold, or used by it, *whether in interstate commerce or not*, to the end that the State may the more readily enforce said excise tax to the extent that it has lawful power to enforce it as above stated." (Italics ours.)

Monamotor Oil Co. v. *Johnson* upheld an Iowa statute. The complainant there sought an injunction prohibiting tax officers from requiring the distributor of motor oil received

from another state to pay into the state treasury the tax levied upon the consumer.

This Court in holding the Oil Company's contention untenable said:

> "There is no substance in the claim that the statutes impose a burden upon interstate commerce, * * * The statute in terms imposes the tax on motor vehicle fuel used or otherwise disposed of in the state. Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement. * * * The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, *report and pay* the tax on the gasoline thus coming into the state for use by others on whom the tax falls *imposes no unconstitutional burden either upon interstate commerce or upon the appellant.*" (Italics ours.)

Henneford v. *Silas Mason Co.* upheld a Washington statute similar to the one under consideration. The opinion declared:

> "The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.
>
> "Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination * * *. This is so, indeed, though they are still in the original packages * * *. For like reasons they may be subjected, when once they are at rest, to a non-discriminatory tax upon use or enjoyment * * *. A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate."

The requirement that the retailer act as agent of the state in collecting the tax from its customers is not an attempt on the part of the state to impose its laws extra-territorially.

Henneford v. *Silas Mason Co.*, 300 U. S. 577; 81 L. Ed. 814.
Monamotor Oil Co. v. *Johnson*, 292 U. S. 86; 78 L. Ed. 1141.
Felt & Tarrant v. *Gallagher*, 306 U. S. 62; 83 L. Ed. 488.

The use tax is conditioned upon an event occurring within the state of Iowa, namely, use, and it is immaterial if the order was the result of personal solicitation, or the approval of the order an extra-state activity.

McGoldrick v. *Berwind-White Coal Min. Co.*, 309 U. S. 33; 84 L. Ed. 565; 60 S. Ct. 388; 128 A. L. R. 876.
Jagels v. *Taylor*, 309 U. S. 619; 84 L. Ed. 983; 60 S. Ct. 469.

The collection and payment provisions of the Iowa Use Tax Act as applied to petitioner imposes no unconstitutional burden on interstate commerce.

McCarroll v. *Dixie Greyhound Lines*, 309 U. S. 176; 84 L. Ed. 683.
Wiloil Corp. v. *Pennsylvania*, 294 U. S. 168; 79 L. Ed. 838.
Hollis & Co. v. *McCarroll*, 200 Ark. 523; 140 S. W. (2d) 420.

The facts in *Felt & Tarrant Mfg. Co.* v. *Gallagher* are, in our opinion, similar to those in the case at bar. In parallel columns we set out the facts in each of these cases.

Felt & Tarrant Mfg. Co.	*General Trading Co.*
1. It was an Illinois corporation engaged in manufacturing and selling comptometers in that state and delivering these to pur-	1. It was a Minnesota corporation engaged in the business of dealing in wholesale iron and steel and automobile accessories which

chasers in various parts of the Union.

2. Carried on no intrastate operations in California.

3. Orders were taken by agents subject to acceptance or rejection by the home office in Illinois.

4. If order was accepted the machine was forwarded directly to the purchaser, or in order to secure reduced freight charges, large groups of machines were shipped to the general agent who made delivery to the respective purchasers. The only machines kept by plaintiff In California were those used as demonstrators.

5. Two general agents, each of whom was allotted a separate section of the state were engaged by Felt & Tarrant in the state of California. Under the employment contract the only compensation paid to the general agents consisted of commissions on sales made. Each general agent was given the privilege of employing sub-agents subject to the approval of plaintiff, also plaintiff agreed by the employment contract to pay the rent of an office for each

it sells among others to retailers in Iowa and also to persons living in Iowa who were not retailers, but bought them for their own use.

2. Carried on no intrastate operations in Iowa.

3. Agents took orders subject to acceptance or rejection by the home office in Minneapolis.

4. If the order was accepted by the home office in Minneapolis, the wholesale iron and steel and automobile accessories were shipped directly to the purchaser in Iowa by delivery to common carriers either by truck or rail or by delivery to the U. S. Postal Department for transportation to such purchasers.

5. Sent traveling salesmen, "from time to time during the period aforesaid", from the state of Minnesota into the state of Iowa, who solicited orders for said merchandise, which orders were expressly subject to acceptance or rejection by defendant at its office in Minneapolis.

general agent, provided the lease was first approved by it, such office to be used exclusively for furthering plaintiff's interstate business.

6. Plaintiff never qualified to do intrastate business in California.

7. Activities of plaintiff's agents were confined solely to promoting its interstate business. Said agents had no authority to represent plaintiff in any intrastate business activity. As a matter of fact had plaintiff carried on intrastate business it would have been in direct violation of the California law with reference to foreign corporations doing business in that state.

8. Plaintiff shipped no merchandise to California unless there was on file in its home office an approved order for same.

9. Plaintiff agreed to pay part of the traveling expenses incurred by each general agent, his sub-agents and demonstrators while traveling on business trips authorized by plaintiff and also to reimburse each general agent to the extent of part of the moneys advanced to a sub-agent and, in addition, in the amount of $40.00 per month toward the salary of a demonstrator.

6. Defendant never qualified to do intrastate business in Iowa.

7. Activities of defendant's agents were confined solely to promoting its interstate business. Said agents had no authority to represent defendant in any intrastate business activity. As a matter of fact had defendant carried on intrastate business it would have been in direct violation of the Iowa law with reference to foreign corporations doing business in this state.

8. Defendant shipped no merchandise to Iowa unless there was on file in its home office an approved order for same.

9. While it is not stated in any of the pleadings, it may be assumed, we believe, that defendant paid its traveling salesmen the expenses incurred by them while traveling on company business in this state. If such expenses were not paid as such, it may in any event be assumed that the salary or commissions paid were sufficiently large to cover these expenses.

10. The California statute defines "retailer" as including "every person engaged in the business of making sales for storage, use or other consumption or in the business of making sales at auction of tangible personal property owned by such person or others for storage, use or other consumption provided, however, that when in the opinion of the board, it is necessary for the efficient administration of this Act to regard any salesmen, representatives, peddlers or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors or employers, the board may so regard them and may regard the dealers, distributors, supervisors, or employers as retailers for the purposes of this Act. The Act also requires every retailer maintaining a place of business in the state, and making sales of tangible personal property for storage, use or other consumption in the state not exempted under the law to collect the tax imposed by the Act from the purchaser.

10. The Iowa statute provides " 'retailer maintaining a place of business in this state' shall mean and include any retailer having or maintaining within this state * * * any agent operating within this state under the authority of the retailer whether such agent is located here permanently or temporarily * * *."

An attempt is being made by the petitioner to distinguish the case at bar from *Felt & Tarrant* v. *Gallagher*. We sincerely contend that the two cases cannot be distinguished. In both cases the agent's activities were confined solely to promoting their respective employers interstate business. The fact that the agents in the *Felt & Tarrant* case were living in California and had an office there, we think does not make the cases distinguishable, for in the latter case as in the case at bar, the agents sent out by the Minnesota and Illinois corporations could do nothing except take orders subject to acceptance or rejection by their employers at the home office. In both cases, if the order was accepted, the merchandise was shipped into the state in interstate commerce. Certainly the fact that the agents in the case at bar lived and worked in Iowa temporarily only, does not render the two cases distinguishable. We confidently assert that the *Felt & Tarrant* case is perfect authority for the position taken by us in the instant case.

We place equal reliance upon the cases of *Nelson* v. *Sears Roebuck & Co., Supra, Nelson* v. *Montgomery Ward & Co., Supra, Bowman* v. *Continental Oil Co., Supra, Monamotor Oil Co.* v. *Johnson, Supra, Henneford* v. *Silas Mason Co., Supra,* and other cases which, we believe, in principle, cannot be distinguished from the case at bar.

Under the heading "Reasons Relied on for the Allowance of the Writ" petitioner asserts that this Court should issue the writ because the decision below by the Supreme Court of Iowa is in direct conflict with the decision of the Supreme Court of Michigan in *Simpson* v. *Gundry*, 297 Mich. 403, 298 N. W. 81, certiorari denied, sub. nom. *Brown* v. *Simpson*, 314 U. S. 674. It is the claim of petitioner that the Michigan Supreme Court held its use tax invalid under the Federal Constitution as applied to the identical state of facts under which Iowa sustained its tax. We must respectfully assert that there is no merit in this contention. A casual reading

of the *Simpson* v. *Gundry* case will at once make it apparent that it is readily distinguishable from the case at bar. In the *Simpson* case it was held that the provisions of the statute expressly exempted plaintiff from the operation of the Michigan Use Tax Act under the peculiar facts of that case. The following quotation from the opinion will sustain our contention:

> "(1) A definition of words and phrases in an act carries no force unless employed in the enactment and cannot be considered in the present instance for the quoted enactment, by its specific terms, only applies to sellers of 'tangible personal property for storage, use or other consumption in this state, engaged in the business of selling at retail in this state', and this is manifested by the required registration of such persons under the act, unless registered under the sales tax act.
>
> (2) Plaintiff did not so register. * * *"

In other words, all that the *Simpson* case holds is that the Michigan Use Tax Act was not applicable to plaintiff for by its very terms it applied only to sellers of tangible personal property for storage, use or other consumption in the state engaged in the business of selling at retail. The term "seller" was defined to mean "the person from whom a purchase is made and includes every person engaged in this state or elsewhere in the business of selling tangible personal property for storage, use or other consumption in this state." The Act then goes on to provide:

> "Every seller of tangible personal property for storage, use, or consumption in this state engaged in the business of selling at retail in this state * * *."

It becomes apparent, therefore, that while the term "seller" was defined to include plaintiff, such definition had no force because it was not employed in the enactment itself and could not therefore be considered. In other words, the effect of the decision in the *Simpson* case is that as the Use

Tax Act was interpreted by the Michigan Supreme Court, the enactment did not apply to plaintiff under the facts revealed by the record. We maintain that upon the facts and the law, the *Simpson* case is clearly distinguishable from the case at bar. Certiorari was denied in the *Simpson* case and properly so, for your Honors were asked merely to decide whether the Michigan Supreme Court properly interpreted certain provisions of the Michigan Use Tax Act.

We are confident that it is superfluous to cite authorities to this Court on the proposition that the writ of certiorari will not be granted by this Court to review the correctness of a State Supreme Court's interpretation of state statutes.

CONCLUSION.

As this Court has held, the Iowa Use Tax is complementary to the Iowa Sales Tax. The former was enacted to remove the temptation of residents of Iowa to make purchases of merchandise under circumstances that would permit them to evade the payment of the Iowa sales tax. The use tax was enacted for the protection of Iowa retailers, many of whom, particularly those residing near the borders of the state were faced with ruinous competition by non-resident retailers. The use tax is a just and proper excise and petitioner in this case, we assert, does not come into any Court of Justice with very good grace when it asks to be permitted to compete with Iowa retailers on a 2% price differential. What the General Trading Company in effect says in the case at bar is this:

> "We have discovered a method of evading the Iowa use tax law and we want this Court to place its stamp of approval thereon."

Certainly respondent representing the people of Iowa has a right to ask this Court to protect it from those who are bent upon that which is clearly inimical to the retailers

of Iowa who conscientiously collect and pay sales tax on all goods sold by them. We are not asking petitioner to pay the use tax out of its own pocket. All we require is that upon business done in Iowa, it collect from its customers and remit to the Tax Commission such use taxes. Certainly this is a just and fair requirement. There is no reason why a foreign retailer should ask to come into Iowa and operate upon any basis except one of equality with Iowa retailers. We are confident that this Court will see the justice of our position and will promptly hold that the contentions of petitioner are foreclosed by what this Court said and ruled in the many cases which we have herein cited and quoted from.

We therefore respectfully ask that petitioner's petition for writ of certiorari be denied.

Respectfully submitted,

JOHN M. RANKIN, Attorney General of Iowa,
JENS GROTHE, Special Assistant Attorney General of Iowa,
Attorneys for State of Iowa, Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 441.

GENERAL TRADING COMPANY, a corporation, doing business as MINNEAPOLIS IRON STORE,
Petitioner,

vs.

STATE TAX COMMISSION OF THE STATE OF IOWA,
Respondent.

RESPONDENT'S BRIEF.

JOHN M. RANKIN, Attorney General of the State of Iowa,
JENS GROTHE, Special Assistant Attorney General of the State of Iowa,
Attorneys for State Tax Commission of the State of Iowa, Respondent.

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RESPONDENT'S BRIEF.

I.

The decision of the Supreme Court of Iowa is reported in *State Tax Commission of Iowa* v. *General Trading Company*, Iowa ____, 10 N. W. (2) 659 (July 27, 1943). It has not appeared in the official Iowa reports.

II.

The jurisdiction of this court is invoked under the order of this court dated November 22, 1943, granting certiorari, (R. 27) under Section 237 (b), as amended, of the Judicial Code. Counsel for petitioner asserts that presumably the writ was granted because the decision below was in conflict

with the Supreme Court of Michigan in *Simpson, Inc.*, v. *Gundry*, 297 Mich. 403; 298 N. W. 81, and with a decision of the Supreme Court of Arkansas in *McLeod* v. *J. E. Dilworth Co.*, 171 S. W. (2nd) 62.

We cannot agree with our learned adversary that the writ in the case at bar was granted because of either of the above mentioned decisions. The *Simpson* case is clearly distinguishable from the case at bar. The Supreme Court of Michigan simply held that the Use Tax of that state did not apply to plaintiff under the peculiar facts of that case. The *McLeod* case is also definitely distinguishable from the case at bar. The Arkansas Supreme Court held that J. E. Dilworth Co. was not liable for sales tax to the state of Arkansas on sales consummated outside the territorial boundaries of that state. In other words, inasmuch as the tax was an excise levied on the sale of merchandise and it appearing that such sale took place in another state, the state of Arkansas was without authority to collect the sales tax from said company. It is obvious, of course, that there is a wide distinction between use tax and sales tax cases. In the latter, the tax is on the sale. In the former, the tax is on the use. In one, it is a tax upon an event occurring within the state. In the other, it is an attempt to levy a tax upon a transaction occurring outside the state. We sincerely contend that the *Simpson* and *McLeod* cases have no application whatever to the legal question involved in the instant case.

III.

STATEMENT OF FACTS.

The question presented is the validity of the Use Tax Law of Iowa as applied to petitioner. The Iowa Use Tax Law imposes an excise tax on the use of tangible personal property purchased for use in Iowa, at the rate of 2% of the purchase price of such property. The tax is imposed upon

every person using such property within Iowa until the tax has been paid to the County Treasurer, *to a retailer*, or to the State Tax Commission as provided in the Act. (Sec. 6943.103, Code of 1939.) Under the provisions of Sec. 6943.109, every retailer maintaining a place of business in Iowa and making sales of tangible personal property for use in Iowa is required by said section to collect the tax imposed from the purchaser at the time of making the sale, *whether such sale be made within or without the state.* Section 6943.112 provides:

> "The tax herein required to be collected by any retailer pursuant to sec. 6943.109 * * * and any tax collected by any retailer * * * shall constitute a debt owed by the retailer to this state."

Subsection 5 of Section 6943.102, Code of 1939, provides:

> " 'Retailer' means and includes every person engaged in the business of selling tangible personal property for use within the meaning of this chapter * * *"

Subsection 6 of said Section 6943.102 provides:

> " 'Retailer maintaining a place of business in this state' or any like term, shall mean and include any retailer having or maintaining within this state, directly, or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, *or any agent operating within this state under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent is located here permanently or temporarily, or whether such retailer or subsidiary is admitted to do business within this state pursuant to Chapter 386.*" (Chap. 386 contains the provisions with reference to permits to foreign corporations to do business in Iowa.)

The Supreme Court of Iowa held in the instant case that the italicized portion of the statute which we have last above set out, applied to petitioner. This question being the Iowa

Supreme Court's interpretation of our own statutes is not, of course, involved in this review.

It is conceded that petitioner is a foreign corporation being organized and existing by virtue of the laws of Minnesota with its principal place of business in St. Paul in that state; that it has never qualified to do business in the state of Iowa as a foreign corporation or otherwise under the Iowa statutes; that petitioner sent from the state of Minnesota into the state of Iowa, traveling salesmen who solicited orders for merchandise which were subject to acceptance or rejection at the home office of petitioner. Thus it will be seen that petitioner comes squarely within the definition of "retailer maintaining a place of business in this state", said term being defined by subsection 6 of Section 6943.102, Code of Iowa, 1939, as including "any agent operating within this state under the authority of the retailer * * * whether such * * * agent is located here permanently or temporarily, or whether such retailer * * * is admitted to do business within this state pursuant to Chapter 386."

Petitioner in its statement of facts asserts:

> "It is only necessary to add that this use tax law applies only to sales made without the state."

This, of course, is not a correct statement. Section 6943.103 specifically provides that the tax is imposed on the use in Iowa of all tangible personal property purchased for use in Iowa. Said section further provides that the tax is imposed upon every person using such property in Iowa until the tax has been paid. Section 6943.109 provides:

> "Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, not exempted under the provisions of section 6943.104 (subsection 1 of section 6943.104 exempts from the tax personal property used in Iowa where the gross receipts from the sale of such property are required to be included in the measure of the tax

imposed by Division IV of Chap. 329.3—Sales Tax Chapter) nor collectible under the provisions of section 6943.107 (Sale of Motor Vehicles) shall at the time of making such sales, *whether within or without the state*, collect the tax imposed by this chapter from the purchaser * * *"

In its statement of facts petitioner also asserts that it is not admitted to do business in Iowa and has no office, agent or place of business and does no business in that state. This, we also say, is not a correct statement. The Supreme Court of Iowa expressly found that petitioner was "a retailer maintaining a place of business in Iowa" and it is conceded that petitioner sent traveling salesmen into Iowa who solicited orders for goods to be shipped into Iowa. These agents, as representatives of petitioner were physically present within this state. They were here for the purpose of furthering their principal's business. They took orders on behalf of their principal subject only to rejection in the event that the customer's credit rating was not acceptable. These agents traveled upon our highways, lived in our hotel rooms and we may assume operated in this state vehicles belonging to their principal. May it be logically said, therefore, that petitioner had no agents or place of business in Iowa? May it be logically said that it did no business in Iowa? We think not.

It is also conceded that petitioner, through said agents, sold to Iowa users wholesale iron and steel and automobile accessories, such sales being made to persons living in Iowa who were not retailers but bought them for their own use in this state.

IV.

SUMMARY OF ARGUMENT.

The Iowa statutes designate the tax forming the basis for this controversy as a use tax. Such use tax is complementary to the sales tax. Such latter tax having been pro-

vided for by a statute passed by the 45th General Assembly (1934). The Iowa Use Tax was enacted by the 47th General Assembly (1937). It is obvious, of course that Iowa in no way attempts to impose this use tax upon petitioner who is the seller of the merchandise. The tax is imposed upon persons using such merchandise within this state. So far as this tax is concerned, the only thing that is required of petitioner is that if it maintains a place of business in Iowa that it collect the use tax from the user and remit same to the Tax Commission. The cases which we will hereinafter cite and quote from will abundantly demonstrate that this is an entirely lawful requirement. In imposing this duty upon petitioner, Iowa imposes no unconstitutional burden upon interstate commerce nor does it in any manner deprive petitioner of its property without due process of law. It is our contention that in order for petitioner to prevail in this case, several of the previous pronouncements of this court will have to be overruled.

V.

ARGUMENT.

(All Italics Supplied.)

Under this division, counsel for petitioner presents, we concede, an extremely ingenious argument. We are constrained to say, however, that when analyzed in the light of previous decisions of this court, it falls of its own weight. To us it seems clear indeed that the proposition argued by petitioner under this division has already been decided adversely to it. The cases that we now proceed to refer to and quote from will, we think, abundantly sustain our contention.

The first of these cases to which we invite the court's attention is *Monamotor Oil Co.* v. *Johnson, supra.* That case originated in the District Court for southern Iowa. Appellant, Monamotor Oil Co., sought a declaration that the laws

of Iowa laying a tax on motor vehicle fuel, violated state and constitutional provisions and an injunction against their enforcement by state officers. The General Assembly of the state, in order to raise revenue for the improvement of highways, imposed a license fee of 2¢ per gallon on all motor vehicle fuel "used or otherwise disposed of in this state for any purpose whatever" and directed that "any person using motor vehicle fuel within the state shall be liable for the fee herein provided for unless the same shall have been previously paid". By a later statute an additional license fee of 1¢ per gallon was imposed. The law defined "distributor" as "any person who brings into the state or who produces, refines, manufactures or compounds within the state any motor vehicle fuel to be *used within the state* or sold or otherwise disposed of by him within the state for use in the state". Appellants were an Arizona corporation engaged in the business of buying, manufacturing, blending and selling gasoline and kindred products *including the importation into Iowa* of gasoline by tank cars, trucks and other containers for sale to consumers and to dealers who sell to consumers. A temporary injunction issued, but a court of three judges upon final hearing, dismissed the suit. The case was carried to the Supreme Court of the United States on direct appeal. The U. S. Supreme Court, in holding untenable appellant's contentions said:

> "There is no substance in the claim that the statutes impose a burden upon interstate commerce * * * The appellant insists that the tax is a direct tax on motor vehicle fuel imported. The court below concluded that the law laid an excise upon the use of fuel for the propulsion of vehicles on the highways of the state. The state officials have administered the tax on this theory. We think this the correct view. The levy is not on property but upon a specified use of property. (Note applicability to case at bar.) *Altitude Oil Co.* v. *People*, 70 Colo. 452, 202 Pac. 180; *Standard Oil Co.* v. *Brodie*, 153 Ark. 114, 239 S. W. 753. It is not laid upon the im-

porter for the privilege of importing * * * but falls on the local use after interstate commerce has ended. (The sentence just quoted disposes of petitioner's contention so far as its burden theory is concerned) * * * *The statute in terms imposes the tax on motor vehicle fuel used or otherwise disposed of in the state. Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement. Nat. Bank* v. *Kentucky*, 217 U. S. 443, 454; *Pierce Oil Corp.* v. *Hopkins*, 264 U. S. 137; *Standard Oil Co.* v. *Brodie*, 153 Ark. 114."

In order to distinguish the above case from the instant case petitioner calls to the court's attention that in the former case, there was intrastate activity. Our answer to that claim is that this contention is not discussed or in any manner alluded to in the opinion. Manifestly the decision in the *Monamotor Oil Company* case was not based upon the fact that the foreign corporation may have been engaged in some intrastate business in Iowa. We maintain that the decision would have been exactly the same had the Monamotor Oil Company transacted no intrastate business in Iowa. This is manifest by the fact that in the *Felt & Tarrant* case which we will hereinafter discuss, the decision was based upon the *Monamotor Oil Company* case and, of course, there was not even any claim that there was any intrastate business transacted by Felt & Tarrant Mfg. Co. in the state of California. We say that the effect of the decision in the *Monamotor Oil Company* case was that where a foreign corporation ships its merchandise into another state, a use tax may be collected from such corporation upon the privilege of use of such property in the latter state. This is not a burden upon interstate commerce. How could this be so when "equality is the theme"? Nor does it violate the provisions of the 14th Amendment to the Constitution of the United States. Quoting further from the *Monamotor Oil Company* case, we set out the following:

"The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, *report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant.*

"The method of imposition and collection of the tax does not deny the equal protection of the laws guaranteed by the Fourteenth Amendment. * * * The short answer to the contention is that the statutes properly construed lay no tax whatever upon distributors, but make of them mere collectors from users of motor vehicle fuel, and refund the tax only to that class of users upon whom no excise is intended to be laid. The distributor does not pay the tax; THE USER DOES. It cannot therefore be said that any tax is laid upon the appellant in case of another class of taxpayers."

The next case to which we invite Your Honors' attention is *Bowman* v. *Continental Oil Co., supra.* In that case a suit was brought by the Continental Oil Company against the Attorney General and others of the state of New Mexico to restrain the enforcement against the company, a distributor of and dealer of gasoline and other petroleum products in that state, of the provisions of an act of the Legislature imposing an excise tax of 2¢ on each gallon of gasoline sold or used and an annual license of $50.00 for each distributing station or place of business. The following summarizes the holding of this court in the *Bowman* case:

1. A state may impose an excise tax upon the use of gasoline by a dealer at his distributing stations in the operation of his auto, tank wagon and trucks employed in the business of distributing his wares for sale although the gas is the product of other states.

2. The excise tax imposed by New Mexico Laws, 1919, Chap. 93, upon the sale and use of gasoline according to the number of gallons sold and used, does not, as applied to domestic sales and use, infringe rights of

dealers of such products under the due process law and equal protection of the law clauses of the U. S. Constitution, 14th Amendment.

The *Bowman* case was also, as you recall, one of the cases upon which you based your decision in *Felt & Tarrant Mfg. Co.* v. *Gallagher*. We quote from the *Felt & Tarrant* case:

> "*Bowman* v. *Continental Oil Company* recognized the right of the state to require a distributor 'to render detailed statements of all gasoline received, sold or used by it, whether in interstate commerce or not, to the end that the State may the more readily enforce said excise tax to the extent that it has lawful power to enforce it as above stated'."

We call next to your attention the case of *Henneford* v. *Silas Mason Co.* wherein you upheld a Washington statute similar to the one now under consideration. You said:

> "The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.
>
> "Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination * * *. This is so, indeed, though they are still in the original packages * * *. For like reasons they may be subjected, when once they are at rest, to a non-discriminatory tax upon use or enjoyment * * *. A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate."

Upon these three cases alone, we say we could safely rest our case. We say in all sincerity our petitioner's contentions with reference to burden on interstate commerce and violation of the due process clause of the 14th Amendment to the U. S. Constitution have been decided adversely to it by said cases.

We assert that since the decision in these cases, there is no longer any doubt concerning the right of a state to require a foreign retailer to collect and remit use taxes upon all merchandise sold by it in such state. Such a requirement does not contravene the commerce clause of the U. S. Constitution nor does it deprive such retailer of its property without due process of law.

Fortunately, however, it is not necessary for us to rely upon the three cases which we have just quoted from. In a more recent case, to-wit: *Felt & Tarrant Mfg. Co.* v. *Gallagher*, decided January 30, 1939, every vestige of doubt concerning the questions involved in the instant case were definitely and finally removed from the arena of further debate. We say without any hesitancy, that only by overruling the case of *Felt & Tarrant* can this court render a decision contrary to the contentions of respondent herein. For the convenience of the court, we set out in parallel columns the facts in the *Felt & Tarrant Mfg.* case and the case at bar.

Felt & Tarrant Mfg. Co.	General Trading Co.
1. It was an Illinois corporation engaged in manufacturing and selling comptometers in that state and delivering these to purchasers in various parts of the Union.	1. It was a Minnesota corporation engaged in the business of dealing in wholesale iron and steel and automobile accessories which it sells among others to retailers in Iowa and also to persons living in Iowa who were not retailers, but bought them for their own use.
2. Carried on no intrastate operations in California.	2. Carried on no intrastate operations in Iowa.
3. Orders were taken by agents subject to acceptance or rejection by the home office in Illinois.	3. Agents took orders subject to acceptance or rejection by the home office in Minneapolis.

4. If order was accepted the machine was forwarded directly to the purchaser, or in order to secure reduced freight charges, large groups of machines were shipped to the general agent who made delivery to the respective purchasers. The only machines kept by plaintiff in California were those used as demonstrators.

5. Two general agents, each of whom was allotted a separate section of the state were engaged by Felt & Tarrant in the state of California. Under the employment contract the only compensation paid to the general agents consisted of commissions on sales made. Each general agent was given the privilege of employing sub-agents subject to the approval of plaintiff, also plaintiff agreed by the employment contract to pay the rent of an office for each general agent, provided the lease was first approved by it, such office to be used exclusively for furthering plaintiff's interstate business.

6. Plaintiff never qualified to do intrastate business in California.

7. Activities of plaintiff's agents were confined solely to promoting its interstate business. Said

4. If the order was accepted by the home office in Minneapolis, the wholesale iron and steel and automobile accessories were shipped directly to the purchaser in Iowa by delivery to common carriers either by truck or rail or by delivery to the U. S. Postal Department for transportation to such purchasers.

5. Sent traveling salesmen, "from time to time during the period aforesaid", from the state of Minnesota into the state of Iowa, who solicited orders for said merchandise, which orders were expressly subject to acceptance or rejection by defendant at its office in Minneapolis.

6. Defendant never qualified to do intrastate business in Iowa.

7. Activities of defendant's agents were confined solely to promoting its interstate business. Said

agents had no authority to represent plaintiff in any intrastate business activity. As a matter of fact had plaintiff carried on intrastate business it would have been in direct violation of the California law with reference to foreign corporations doing business in that state.

8. Plaintiff shipped no merchandise to California unless there was on file in its home office an approved order for same.

9. Plaintiff agreed to pay part of the traveling expenses incurred by each general agent, his sub-agents and demonstrators while traveling on business trips authorized by plaintiff and also to reimburse each general agent to the extent of part of the moneys advanced to a sub-agent and, in addition, in the amount of $40.00 per month toward the salary of a demonstrator.

10. The California statute defines "retailer" as including "every person engaged in the business of making sales for storage, use or other consumption or in the business of making sales at auction of tangible personal property owned by such person or others for storage, use or other consumption pro-

agents had no authority to represent defendant in any intrastate business activity. As a matter of fact had defendant carried on intrastate business it would have been in direct violation of the Iowa law with reference to foreign corporations doing business in this state.

8. Defendant shipped no merchandise to Iowa unless there was on file in its home office an approved order for same.

9. While it is not stated in any of the pleadings, it may be assumed, we believe, that defendant paid its traveling salesmen the expenses incurred by them while traveling on company business in this state. If such expenses were not paid as such, it may in any event be assumed that the salary or commissions paid were sufficiently large to cover these expenses.

10. The Iowa statute provides "'retailer maintaining a place of business in this state' shall mean and include any retailer having or maintaining within this state * * * any agent operating within this state under the authority of the retailer whether such agent is located here permanently or temporarily * * *."

vided, however, that when in the opinion of the board, it is necessary for the efficient administration of this Act to regard any salesmen, representatives, peddlers or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors or employers, the board may so regard them and may regard the dealers, distributors, supervisors, or employers as retailers for the purposes of this Act. The Act also requires every retailer maintaining a place of business in the state, and making sales of tangible personal property for storage, use or other consumption in the state not exempted under the law to collect the tax imposed by the Act from the purchaser.

Petitioner attempts to distinguish the instant case from that of *Felt & Tarrant*. We say in all sincerity that this cannot be done. In principle, these two cases, we contend, are identical. Petitioner in its brief and argument contends that there was intrastate activity in the *Felt & Tarrant* case, its exact words being (p. 8):

> "In all these cases the corporation was actually doing business in the state."

We deny that statement. On the contrary, this court in deciding the *Felt & Tarrant* case expressly found and determined:

> "Plaintiff has never qualified to do intrastate business in California."

Certainly it must be presumed that if plaintiff was not qualified to do intrastate business that it would not in violation of law engage therein. There is not one scintilla of evidence that the Felt & Tarrant Mfg. Company transacted any intrastate business in California. All of the activities of Felt & Tarrant Company's agents was confined exclusively to the promotion of their principal's interstate business. They had no authority whatever to transact any intrastate business. The only thing that they had a right to do was to take orders for comptometers and to transmit such orders to the home office in Illinois there to be accepted or rejected depending upon the credit rating of the prospective purchaser. If the credit rating of the person signing the order was found to be satisfactory, the machine was shipped, sometimes direct to the vendee and at other times, in order to secure reduced freight charges, in larger groups, to the general agent who made delivery to the respective purchaser. The only machines kept by plaintiff in California were those used as demonstrators. Hence, we find in reading the *Felt & Tarrant* case that the only machines shipped to California were those for which the company had an accepted order. The fact that the machines when shipped in larger groups were delivered to the purchasers by the general agent would make no difference, for it is elementary that delivery is an incident of interstate commerce and that such commerce does not end until delivery is complet d. In the *Felt & Tarrant* case, as Your Honors know, the identical contentions were made as in the case at bar. That is, (1) that the statute as construed and applied by the appellees to the appellant was repugnant to Art. 1,

Paragraph 8, Clause 3, of the Federal Constitution (Commerce Clause), and (2) that the threatened enforcement of the statute would deprive appellant of his property without Due Process of Law contrary to the 14th Amendment. In holding that these contentions were without merit you said:

> "The trial court thought that both contentions were foreclosed by what was said and ruled in *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 650, 65 L. Ed. 1139, 1145, 41 Sup. Ct. 606; *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, * * * and *Henneford* v. *Silas Mason Co.*, 300 U. S. 577. *And we agree with that conclusion.*"

Then follows setting out of excerpts from the three above mentioned cases. We humbly acknowledge that we may not comprehend the effect of the decision in the *Felt & Tarrant* case and the three earlier cases upon which it is based but we say in all sincerity that we can see no distinction whatever between these cases and the one at bar, particularly do we fail to perceive the slightest difference in principle between the *Felt & Tarrant* case and the one now before this court. Certainly the fact that the agents in the *Felt & Tarrant* case lived in California and maintained offices there is not a fact upon which any distinction may be based, when it appears without dispute that all that these agents were authorized to do was to promote their principal's interstate activities. The agents in the case at bar came into Iowa. It does not appear how long they were here except that the answer recites that:

> "Defendant from time to time sent traveling salesmen into Iowa."

Now, of course, we know that while they were here they lived in hotel rooms and undoubtedly transacted some of the company's business therefrom. For the time being, this room was the office of the General Trading Company in the state of Iowa. This room, while occupied by petitioner's

agents was protected by the police officers of this state, by the fire departments of this state and we say that for this and other privileges extended petitioner, Iowa had a right to exact a price. What was the price? That it collect and transmit to the state of Iowa the use tax on all merchandise sold by it in this state through said agents. In order to distinguish the instant case from the *Felt & Tarrant* case, we must, as we see it, hold that merely because the agents of the foreign retailer in the case at bar lived here temporarily instead of permanently, makes the cases distinguishable. We cannot believe that this would be a sound distinction. Nor do we think that the fact that the agents in the *Felt & Tarrant* case maintained offices in California, makes the cases distinguishable. These offices were used for the sole and only purpose of promoting the interstate business of Felt & Tarrant.

Therefore, we say that if under the California statute which in all material respects is identical to ours, the foreign retailer could be required to collect use tax upon all comptometers sold by it in California without violating either the commerce clause or the due process clause of the Federal Constitution, then it should follow that the Iowa Use Tax statute should also be upheld as applied to petitioner.

Finally we call to the court's attention the recent case of *Nelson* v. *Sears Roebuck & Co., supra*, and *Nelson* v. *Montgomery Ward & Co., supra*. Those cases both involved the use tax statute now under consideration in this cause. Both of these cases involved the collection and payment provisions of the Iowa Use Tax Act as applied to the corporation's mail order business. It was the contention of respondent that the collection and payment provisions of said act as applied to their mail order business violated the 14th Amendment to the Constitution of the United States because of their extra territorial operation. It was also respondent's claim that the Use Tax Act as applied to said mail order business constituted

a regulation of and a substantial burden upon interstate commerce and hence resulted in an impairment of the free flow of such commerce. In holding both of these contentions untenable this court speaking through Justice Douglas said:

> "The Iowa Use Tax Act is complementary to the Iowa Retail Sales Tax. Iowa Code 1939, Secs. 6943.074, *et seq.* It is a tax on the use in Iowa of tangible personal property at the rate of 2% of the purchase price. 'Use', so far as material here is defined as 'the exercise by any person of any right or power over tangible personal property incident to the ownership of that property'. While the tax is imposed on 'every person using such property within this state until such tax has been paid', it is further provided that every 'retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state * * * shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser * * *'. By section 6943.112, the tax constitutes a 'debt owed by the retailer' to the state * * *. Respondent is a New York corporation authorized since 1928 to do business in Iowa. It has various retail stores there * * *."
>
> "In passing on the constitutionality of a tax law 'we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it'. (*Lawrence* v. *State Tax Commission*, 286 U. S. 276) * * *. *The fact that under Iowa law the sale is made outside of the state does not mean that the power of Iowa 'has nothing on which to operate'. Wisconsin* v. *J. C. Penney Co.* (311 U. S. 435). The purchaser is in Iowa and the tax is upon use in Iowa. The validity of such a tax, so far as the purchaser is concerned 'has been withdrawn from the arena of debate'. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 * * * It is one of the well known functions of the integrated use and sales tax to remove the buyers' temptation 'to place their orders in other states in an effort to escape payment of the tax on local sales'. *Henneford* v. *Silas Mason, supra*. As pointed out in that case (p. 582), the fact that the buyer employs agencies of interstate commerce in order to effectuate his purchase is not material since the tax is 'upon the privilege of use

after commerce is at an end' * * * Use in Iowa is what is taxed, regardless of the time and place of passing title and regardless of the time the tax is required to be paid. *McGoldrick* v. *Berwind-White Coal Min. Co.*, 309 U. S. 33."

"So the nub of the present controversy centers on the use of respondent as the collection agent for Iowa. The imposition of such a duty, however, was held NOT to be an unconstitutional burden on a foreign corporation in *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86."

The facts in the *Montgomery Ward* case were identical to the *Sears Roebuck* case with the exception noted in the following quotation from the opinion:

"There is a further fact in this record which makes a reversal of this judgment necessary. It was stipulated that 'advertisements have been caused to be printed by the retail stores of the petitioner (Montgomery Ward & Co.) in the state of Iowa, advertising not only retail merchandise but the ability to complete service through the use of the catalogue'. This stipulation clearly means that respondent has solicited mail order sales in Iowa. *The fact that that solicitation was done through local advertisements rather than directly by local agents as in Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62 * * * *is immaterial.* Nor is it material that the orders were filled by direct shipments from points outside the state to purchasers within the state. For that method of delivery also obtained in case of some of the orders involved in *Felt & Tarrant Mfg. Co.* v. *Gallagher, supra.*"

The above quotation demonstrates clearly, we think, how utterly untenable is the position taken by petitioner in the instant case. We reiterate that, as we view it, only by overruling the cases which we have herein cited and quoted from can the contentions of petitioner be upheld. As we have indicated, argument of the able and learned counsel for petitioner is indeed an ingenious one, yet we say that when analyzed in the light of the prior pronouncements of this court which we have herein discussed, it vanishes as does the fog before the rising sun.

CONCLUSION.

In conclusion, let us say that we are confident that this court will again construe the constitutional provisions involved in this appeal in such a manner as to "establish justice * * * * promote the general welfare * * *" of the people of the state of Iowa. We would be derelict in our duty were we to fail to call to this court's attention the disastrous results that would follow in the event petitioner's contentions are upheld. Iowa is surrounded by states some of which have not enacted a sales tax law. It does not require an acute imagination to visualize the resultant consequences. Foreign corporations would then be in a position to virtually flood this state with their representatives who would boastfully proclaim that their principal could undersell the retailers of Iowa. We "see" now circulars, letters, catalogues, hand bills, etc., impudently asserting "Buy from us. We are not subject to the Iowa Use Tax." The net result would be that the purpose for which the Iowa Use Tax was enacted would, to a considerable degree, if not entirely, be totally defeated. We think that we as citizens of Iowa have a right to ask this court to so construe the fundamental law of the land that the situation above referred to will not occur.

We invite your attention to our brief in opposition to petition for writ of certiorari in this cause and by reference we incorporate the same herein with the same effect as though it were fully set out.

Finally, we say that upon reason, logic and justice, the writ in this case should be annulled and we so respectfully ask.

JOHN M. RANKIN, Attorney General of the State of Iowa,

JENS GROTHE, Special Assistant Attorney General of the State of Iowa,

Attorneys for State Tax Commission of the State of Iowa, Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 441.—October Term, 1943.

General Trading Company, a Corporation Doing Business as Minneapolis Iron Store, Petitioner, vs. State Tax Commission of the State of Iowa.

On Writ of Certiorari to the Supreme Court of the State of Iowa.

[May 15, 1944.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The State Tax Commission of Iowa brought this suit under the authority of the Iowa Use Tax Law which was recently here in *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, and *Nelson* v. *Montgomery Ward*, 312 U. S. 373. The question now presented is, in short, whether Iowa may collect, in the circumstances of this case, such a use tax from General Trading Company, a Minnesota corporation, on the basis of property bought from Trading Company and sent by it from Minnesota to purchasers in Iowa for use and enjoyment there.

By the Iowa Use Tax Law a tax is "imposed on the use in this state of tangible personal property purchased . . . for use in this state at the rate of two percent of the purchase price of such property. Said tax is . . . imposed upon every person using such property within this state until such tax has been paid directly to the county treasurer, to a retailer, or to the commission . . . ." § 6943.103, Code of Iowa 1939. The use of property the sale of which is subject to Iowa's sales tax is exempted from the use tax (§ 6943.104(1)), but the sales tax can be laid only on sales at retail within the State. § 6943.075. The use tax constitutes a debt owed by the retailer to the State. § 6943.112. But "Every retailer maintaining a place of business" in Iowa must collect this tax from the purchaser (§ 6943.109), and may not advertise that he will himself absorb the tax. § 6943.111. Finally an offsetting credit (see *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 584, 586-7) if another use or sales tax has been paid for the same thing else-

where is allowed, and if the tax "imposed in such other state is two percent or more, then no tax shall be due on such articles." § 6943.125.

A judgment in favor of the Tax Commission by one of the lower courts was affirmed by the Supreme Court of Iowa, —Iowa —; 10 N. W. 2d 659. The application by that Court of its local laws and the facts on which it founded its judgment are of course controlling here. From these it appears that General Trading Company had never qualified to do business as a foreign corporation in Iowa nor does it maintain there any office, branch or warehouse. The property on which the use tax was laid was sent to Iowa as a result of orders solicited by traveling salesmen sent into Iowa from their Minnesota headquarters. The orders were always subject to acceptance in Minnesota whence the goods were shipped into Iowa by common carriers or the post. Upon these facts and its holding that Trading Company was a "retailer maintaining a place of business in this state" within the meaning of the Iowa statute, the Iowa Supreme Court held that Iowa had not exceeded its powers in the imposition of this use tax on Iowa purchasers, and that collection could validly be made through the Trading Company.

We brought the case here, 320 U. S. 731, to meet the claim that there was need for further precision regarding the scope of our previous rulings on the power of States to levy use taxes. In view, however, of the clear understanding by the court below that the facts we have summarized bring the transaction within the taxing power of Iowa, there is little need for elaboration. We agree with the Iowa Supreme Court that *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62; *Nelson* v. *Sears, Roebuck & Co., supra;* and *Nelson* v. *Montgomery Ward, supra,* are controlling. The *Gallagher* case is indistinguishable—certainly nothing can turn on the more elaborate arrangements for soliciting orders for an intricate machine for shipment from without a State as in the *Gallagher* case, compared with the apparently simpler needs of soliciting business in this case. And the fact that in the *Sears Roebuck* and *Montgomery Ward* cases the interstate vendor also had retail stores in Iowa, whose sales were appropriately subjected to the sales tax, is constitutionally irrelevant to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail order

goods forwarded into Iowa from without the State. All these differentiations are without constitutional significance. Of course, no State can tax the privilege of doing interstate business. See *Western Live Stock* v. *Bureau*, 303 U. S. 250. That is within the protection of the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which it may draw from a State to the upkeep of which it may be asked to bear its fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. See *Best & Co.* v. *Maxwell*, 311 U. S. 454.

None of these infirmities affects the tax in this case any more than it did in the other cases with which it forms a group. The tax is what it professes to be—a non-discriminatory excise laid on all personal property consumed in Iowa. The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the tax collector for the State is a familiar and sanctioned device. *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 93-94; *Felt & Tarrant Co.* v. *Gallagher*, *supra*.

Affirmed.

Mr. Justice JACKSON, dissenting.

This decision authorizes in my opinion an unwarranted extension of the power of a state to subject persons to its taxing power who are not within its jurisdiction and have not in any manner submitted themselves to it. The General Trading Company is, in the language of the opinion, made "the tax collector for the tax." "We have heretofore held, and I think properly, that the state may make tax collectors of those who come in and do business within its jurisdiction, for thereby they submit themselves to its power. Such was the situation in both *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, and *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62. These are the only authorities cited by the Court on this point, and they clearly are not precedents to support this decision.

In this case, as the opinion points out, the General Trading Company never qualified in Iowa and has no office, branch, warehouse, or general agent in the State. From Minnesota it ships goods ordered from salesmen by purchasers in Iowa. Orders are accepted only in Minnesota. The transaction of sale is not taxed and, being clearly interstate commerce, is not taxable. *McLeod* v. *Dilworth Co.*, No. 311, decided today. So we are holding that a state has power to make a tax collector of one whom it has no power to tax. Certainly no state has a constitutional warrant for making a tax collector of one as the price of the privilege of doing interstate commerce. He does not get the right from the state, and the state cannot qualify it. I can imagine no principle of states' rights or state comity which can justify what is done here. Nor does the practice seem conducive to good order in the federal system. The power of Iowa to enforce collection in other states is certainly very limited and the effort to do so on any wide scale is unlikely either to be systematically pursued or successfully executed.

I recognize the pressure to uphold all manner of efforts to collect tax moneys. But this decision, by which one may not ship goods from anywhere in the United States to a purchaser in Iowa without becoming a nonresident tax collector, exceeds everything so far done by this Court. In my opinion the statute is an effort to exert extraterritorial control beyond any which a state could exert if there were no Constitution at all. I can think of nothing in or out of the Constitution which warrants this effort to reach beyond the State's own border to make out-of-state merchants tax collectors because they engage in interstate commerce with the State's citizens.

Mr. Justice ROBERTS joins in this opinion.